(19,204.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1 In the Supreme Court of Iowa, January Term, A. D. 1901.

GEORGE SCHLOSSER, Appellee,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO County, Iowa, Appellants. } In Equity.

Appeal from Palo Alto district court—Hon. W. B. Quarton, judge.

Buck & Kirkpatrick and Carr & Parker for plaintiff and appellee.

E. B. Evans and Morling & Davidson for defendants and appellants.

Appellants' Abstract of Record.

On the 13th day of January, 1900, the plaintiff filed the following

Petition.

"That the plaintiff is the absolute owner in fee simple of lots 2 and 3 in section 30, T. 97, R. 34, that the said lots were surveyed by the Government and platted and the record of said sur-
2 vey and plats were duly returned to the General Land Office at Washington, D. C., and became a part of the records of said office; that said lots were meandered by the Government surveyor, and said meander lines run with reference to a lake then existing in part upon said section and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation between said meander line and the lake; that subsequent to the filing of said survey and plat the United States sold said land and issued patent thereto to one John A. Anthony; that by *mean* conveyances the land has been transferred to this plaintiff; plaintiff purchased said lots relying upon the fact that the Government had platted and sold said lots without any reservation between the meander line and the lake; about 1899 the defendants without the consent of the plaintiff entered into possession of all the land between the meander line and the lake proper and are now claiming title to said land, which claim is adverse to title of plaintiff.

"That the plaintiff's title includes all of the land embodied in the south half of said section and his title is complete to all of said land claimed adversely by the defendants. Plaintiff further states that the defendants other than Palo Alto County are engaged in committing waste on said real estate by cutting and carrying away the timber thereon; that the said defendants are insolvent; wherefore the plaintiff prays that the fee simple title to all the real estate described be

established and quieted in plaintiff; that the defendants and each of them be forever barred and estopped from having any title or interest in said real estate adverse to the plaintiff and that the defendants be enjoined from cutting and clearing away any of the timber standing thereon; that in the event the court should determine the plaintiff is not the owner of all of the land included in the south half of said section
3 that the court then determine the extent of the boundary of the plaintiff's land and that the court decree that the plaintiff is the fee simple owner to all the land between the meander line and the bank and edge of the lake as meandered, as well as the land between the meander line and the south line of section 30 and that title be quieted in the plaintiff and the defendants barred from having any interest or title in said real estate adverse to this plaintiff, and the defendants be enjoined from cutting and removing timber thereon, and such other relief as may seem equitable and a writ issue removing the defendants from said premises and placing plaintiff in possession."

On the 8th day of January, 1900, upon presentation of the foregoing petition the judge issued the following

Order.

"On presentation of the foregoing petition it is ordered that a temporary injunction issue against the defendants, W. L. Hemphill and Richard Ryan, restraining them from cutting and removing any timber from any portion of the south half of section 30, T. 97, R. 34, and from any portion of the land between the meander line of lots 2 and 3 of said section and the waters of the lake. Defendants excepts.

"Dated, Algona, Iowa, this 8th day of January, 1900.

"W. B. QUARTON, *Judge.*"

On the 4th day of March, 1900, Richard Ryan filed the following

Answer.

"This defendant denies each and every allegation in plaintiff's petition not hereinafter specifically admitted; as to whether the Government issued patents to lots 2 and 3 and the plaintiff is the owner of said land the defendant asks the court to require strict
4 proof; as to whether said lots were surveyed and platted by the Government and said survey and plats filed in the General Land Office and as to whether said lots were meandered defendant has not sufficient knowledge to form a belief, and denies the same; the defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30, T. 97,

R. 34. Defendant states that lots 2 and 3 of said section contains 99.80 acres, as shown by the Government survey and plats of said lots; that the patent from the United States and the warranty deeds as set forth in plaintiff's petition in describing said land only purported to convey the number of acres in each lot as shown by the Government survey and plats, and that neither said patent nor deeds purport in any manner to convey the land embraced in lots 12 and 13, being a part of the land in controversy, and defendant denies that said patent or deeds conveyed any title whatever to the land embraced in lots 12 and 13. Defendant states that on the 8th day of March, 1898, the Secretary of the Interior directed the Commissioner of the General Land Office to cause to be surveyed certain unsurveyed land in sections 19–20–29 and 30, T. 97, range 34, and sections 25, 36, T. 97, R. 35, that the Commissioner of the General Land Office caused the unsurveyed land in said sections to be surveyed; that said survey was made on the 2d to the 20th days of April, inclusive, of the year 1898; that there *was* surveyed by said Government surveyor 1230 acres of land in the aforesaid sections; that the plat of said survey and the subdivisions of said 1230 acres of land, together with field notes, was duly made by said surveyor and filed in the General Land Office at Washington, D. C., in accordance with law; the land so surveyed became subject to disposal under the laws of the United States for the disposal of public land; under direction of the Secretary of the Interior the register and receiver of the United States land office at Des Moines, Iowa, published notice as required by law that said 1230 acres of land would be open to entry on the 30th day of August, 1898; that prior to the 30th day of August, 1898, defendant had established his residence upon lots 12 and 13 of said section, and on the 30th day of August, 1898, he filed his written application to enter the land embraced in said lots as a homestead, together with the evidence required by law showing his qualification to make homestead entry of Government land; that his application was approved and the defendant paid the required fees and commis-ion to the receiver of said land office; his entry was allowed and became of record, and that said entry is now of record and in full force and effect, and the defendant is now engaged in living upon, cultivating and improving the land embraced in his homestead entry, being a part of the land plaintiff seeks in his petition to have title decreed in plaintiff. Defendant states that the land embraced in his said homestead entry is adjacent to and attached to and is in the same condition as the land involved in the case of Grant *vs.* Hemphill decided by the supreme court of the State of Iowa on the 26th day of May, 1894 (92 Iowa, 218), wherein it was held that 'all of the land in dispute is a part of the unsurveyed domain of the United States to which any one can not obtain title except through the regular Government method adopted by the General Government for the disposal of public lands.' The defendant states that this court has no jurisdiction over the subject matter of this suit; that is over lots 12 and 13 of said section for the reason

that the legal title to the land embraced in said lots is in the Government of the United States, subject to the rights of this defendant to finish and complete his residence and cultivation of said lots, as required by the law.

"Defendant attaches hereto copy of his homestead application marked Exhibit 'A,' copies of his affidavit attached to said application marked Exhibits 'B' and 'C,' copy of homestead receipt marked Exhibit 'D,' copy of homestead entry book and of tract book of the Government Land Office marked Exhibit 'E' and 'F,' all of
6 which are made a part of his answer."

Defendant states that on the 30th day of August, 1898, the plaintiff, George Schlosser, recognizing the validity of the survey made in the year 1898, as herein set forth, filed application to enter lots 13 and 14 of said section, being a part of the land in controversy, as an adjoining farm homestead; that his application was rejected by the register and receiver, notice of which was served on the plaintiff; that thereupon said Schlosser filed in said land office a contest against the homestead entry of this defendant; that a trial was had before the register and receiver upon the contest brought by the plaintiff, the plaintiff and this defendant appearing thereto; the register and receiver rendered their decision in favor of this defendant; within the time allowed for appeal the plaintiff, George Schlosser appealed from said decision; that upon said appeal the said case is now pending before the Commissioner of the General Land Office at Washington, D. C.; that no decision thereon has been had. Certified copy of docket entry of said case is hereto attached marked Exhibit "G," and made a part hereof. Wherefore, the defendant prays that the court will require plaintiff to reply to the allegation of this defendant's answer as set forth in Exhibits A to G, inclusive, and that upon the admission of the plaintiff of the truth of said facts or upon the proof of the allegations contained in said exhibits the court will dismiss the plaintiff's bill for want of jurisdiction, and that the plaintiff's petition may be dismissed with costs against the plaintiff and for general relief.

EXHIBIT "A."

"I, Richard T. Ryan, of Ruthven, Iowa, do hereby apply to enter under section 2289, R. S. of the United States, lots 12 and 13 of section 30, T. 97, R. 34.

RICHARD T. RYAN."

7 "I, Thornton S. Howard, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter, and there is no valid adverse right to the same.

THORNTON S. HOWARD, *Register*."

EXHIBIT "B."

"I, Richard T. Ryan, of Ruthven, Iowa, do solemnly swear that I am a native born citizen of the United States, over 21 years of age; that my application is honestly and in good faith made for the purpose of actual settlement and cultivation."

EXHIBIT "D."

"Receiver's receipt No. 1312.

RECEIVER'S OFFICE,
DES MOINES, IOWA, *September* 19, 1899.

"Received of Richard T. Ryan the sum of $15.07, being the amount of fees and compensation of the register and receiver for the entry of lots 12 and 13 of section 30, T. 97, R. 34.

STEPHEN J. LOUGHRAN, *Receiver*."

EXHIBIT "E."

Register of homestead entries. Application No. 1312. September 19, 1898. Lots 12 and 13, section 30, T. 97, R. 34; 101 acres. Richard T. Ryan, Ruthven, Iowa; fees, $10. Commissions $5.10.

EXHIBIT "F."

Tract book. Land office, Des Moines, Iowa. Lots 12 and 13, section 30, T. 97, R. 34, 101 acres; H. E. No. 1312. Richard T. Ryan, Ruthven, Iowa.

EXHIBIT "G."

George Schlosser vs. Richard T. Ryan, docket entry No.
8 853, lot No. 13, section 30, T. 97, R. 34, October 27, 1898. Contest notice filed by George Schlosser. Hearing set for 10 a. m. September 7, 1898, before the register and receiver of the United States land office at Des Moines, Iowa, at which time Schlosser appeared in person and by his attorney, J. F. Conrad. Ryan appeared in person and by his attorney, E. B. Evans. Each submitted evidence and testimony closed. June 29, 1900, the register and receiver rendered their decision in favor of Ryan. July 27, 1899, J. F. Conrad filed appeal of George Schlosser. August 12, 1899, case reported and sent to the General Land Office.

On the 4th day of March, 1900, Palo Alto County and W. L. Hemphill filed the following joint

Answer.

(As to lots 2 and 3, and the Government survey mentioned in plaintiff's petition; as to survey made under authority of the decision of the Secretary of the Interior of March 8, 1898, mentioned in the answer of Richard T. Ryan, the answer of these defendants are identical with that of Richard T. Ryan.) For further answer these defendants states that lots 11, 14 and 15 of section 30, T. 97, R. 34, as shown by the Government survey made from the 2d to the 20th day of April, inclusive, for the year 1898, *is* swamp and overflowed lands and *was* included in the grant of September 28, 1850, to the State of Iowa, made by the Government of the United States wherein all the swamp and overflowed land in the State of Iowa was granted to the State of Iowa and said lots were included in the grant of the legislature of the State of Iowa wherein all swamp and overflowed land in Palo Alto county was granted to Palo Alto county. And that the defendant, W. L. Hemphill, has purchased from said county said lots, and has paid a part of the
9 purchase price therefor; that the legal title to said lots remain in the United States as patent has not yet issued; that the equitable title is in Palo Alto county subject to a contract of sale of defendant, Hemphill; that on the 30th day of August, 1898, said county by its duly authorized swamp land agent selected said lots as swamp and overflowed land and filed such selection in the United States land office at Des Moines, Iowa; that on the same day the plaintiff herein made application to enter said lot 14 as an adjoining farm homestead, his said application being filed in the United States land office at Des Moines, Iowa; that by order of the register and receiver of said land office a trial was had before said officers, of which the plaintiff herein had notice; that said officers rendered their joint decision, holding each of said lots to be swamp and overflowed land and approving the same to the State of Iowa and Palo Alto county; that said decision was forwarded to the Commissioner of the General Land Office on appeal of the plaintiff herein; that the Commissioner of the General Land Office affirmed the decision of the register and receiver; that thereafter the Secretary of the Interior affirmed the decision of the Commissioner and has approved each of said lots for patent; that there only remains the ministerial act of preparing and executing the patent from the Government of the United States to the State of Iowa and from the State of Iowa to Palo Alto county to establish the legal title in said county. These defendants deny that this court has jurisdiction over the subject matter of this suit. Wherefore, the defendants pray that the petition of the plaintiff be dismissed and judgment rendered against the plaintiff for costs and for general relief.

On the 11th day of April, 1900, the plaintiff filed the following

Reply.

Plaintiff for reply to the answer of Richard T. Ryan de-
10 nies every allegation not otherwise admitted or plead to.
Plaintiff denies that defendant went into possession of a portion of the land on or about August, 1898, and has resided thereon since said time; he denies that land upon which defendant resides is a part of the land claimed in this action by the plaintiff; he admits that he made application to enter a portion of this land as stated; that said application was made under advice of counsel that it would not waive or bar his title obtained by him thereon if he obtained the same by virtue of the patent issued to said Anthony through whom he claims title, and that it would be cheaper to obtain the claimed outstanding title by entry. That all of the proceedings with reference to the resurvey of the land and opening the same for homestead was without authority or jurisdiction for the reason that prior theretofore the United States had caused section 30 to be surveyed and platted and thereafter sold and conveyed said land according to the official plat to John A. Anthony; that by said patent the United States parted with all its title to the land in controversy herein.

On the 11th day of April, 1900, W. L. Hemphill filed the following amendment to his

Answer.

That prior to the 29th day of April, 1900, the plaintiff had fenced n and was in possession of the land described in the petition outside of the meander line, and had thereon a fence; that the defendants, Hemphill and Ryan, were claiming said land and the possession and ownership thereof as set out in their answers; that the plaintiff and this defendant had entered into an oral agreement whereby for the consideration of $25 then paid by the defendant to the plaintiff the plaintiff sold to this defendant said fences and relinquished to
the defendant said land and all claims and demands of the
11 plaintiff thereto, and thereupon the plaintiff executed to this
defendant a written contract and receipt in words and figures as follows, to-wit:

"RUTHVEN, IOWA, 4–29, 1899.

"I hereby sell all my interest in the following fences on the section line between sections 29 and 30 of two wires on what borders up to Crookshank's. One on or near the county line of about 80 rods and one starting on or near the half section line on the west side of section 30, and running in an irregular line to southwest corner of lot 4, section 30, of two wires. And a three wire fence running from southwest corner of lot 4 to half section corner on east

line of section 30 to the said W. L. Hemphill, all being in township 97–34 and 97–35, for the sum of $25.00 in hand paid by the said Hemphill for possession of land and fences.

"GEORGE SCHLOSSER."

That thereafter the plaintiff and this defendant entered into further oral agreement that the parties should have Leroy Grout, county surveyor of Palo Alto county, run a boundary line between the land of the plaintiff and of the defendants in accordance with the meander line of the original Government survey, and that said line should be the boundary line between the land of the plaintiff and these defendants, and that division fence should be built upon the same; plaintiff should build half and the defendants half of said fence; that thereafter the said parties did procure said Grout to run said line, and thereafter these defendants built their half of said fence and the plaintiff built a portion of his half of said fence and the parties thereafter occupied their respective premises and by reason of said agreement the meander line and the fence thereon has become and is the boundary and division line between the lands of the parties hereto.

12 On the 11th day of April, 1900, the defendant, Richard Ryan, filed the following

Amendment to His Answer.

Richard Ryan amending his answer makes a part hereof all the allegations of paragraph 12 of the amendment to the answer of W. L. Hemphill, and further shows that the land of this defendant, Richard Ryan, lies between the land of the defendant, Hemphill, in said amendment referred to. Further answering the defendant says that under and by virtue of the laws of the United States the defendants herein are the owners of the land in controversy herein; that defendants claim the ownership and possession of said lands by virtue of the acts of Congress; that prior to the several acts of the Land Department of the United States in the answer of the defendants referred to, said lands were public lands of the United States; that the State of Iowa and the courts and laws of Iowa had no authority or jurisdiction there over; that only the courts of the United States and the Land Department thereof have any jurisdiction of this controversy.

On the 11th day of April, 1900, the plaintiff by way of reply to the answer and amendment thereto of Palo Alto county and W. L. Hemphill, filed the following

Reply.

"Division 1. Plaintiff denies each and every allegation in said answer and amendment except admitted or plead to. With the explanations in this reply hereinafter stated, plaintiff admits that on

the 30th day of August, 1898, he filed application in the United States land office at Des Moines, Iowa, to enter lot 14; that a trial was ordered by the register and receiver and had before said officers
to determine the swampy or-on-swampy character of said lot;
13 that at said trial the plaintiff appeared with cou-sel; that the register and receiver rendered their joint decision, holding said lot as swamp land and approved the application of the State of Iowa and Palo Alto county; that the plaintiff appealed; that the Commissioner of the General Land Office affirmed the decision of the register and receiver; that the Secretary of the Interior approved the decision of the Commissioner, and approved said lot for patent; that there only remains the ministerial act of preparing and executing a patent from the United States to the State of Iowa and from the State of Iowa to Palo Alto county, conveying the legal title to the county. Plaintiff admits that on the 29th day of April, 1899, he entered into an oral contract with W. L. Hemphill for the sale of a fence; that said fence was not located on the south half of section 30. Plaintiff specially denies that there was any contract with reference to the possession of any part of the land in controversy; that he signed or executed the receipt set out in said answer, but avers that he did sign a receipt for $25 for the purchase price of the fence; that if said paper set out bears the true signature of the plaintiff the last six words, to-wit: (for possession of land and fence) *was* inserted therein after the same had been signed and without plaintiff's knowledge and consent; that the instrument as it now appears is not the instrument signed by plaintiff. Plaintiff denies each and every allegation except the oral agreement of the boundary lines, except he admits he had a conversation with said defendant with reference to ascertaining the lines of the Barber survey, and did agree if the defendant would employ Grout to run said lines, and if it was determined plaintiff's line did not exist further than the lines so surveyed by Barber he would pay half the expenses of said survey.

Division 2. As to the acts and proceedings in the Land De-
14 partment of the United States plaintiff replies the same as in his reply to the answer of Richard Ryan."

On the 15th day of May, 1900, the defendants, W. L. Hemphill and Palo Alto County, filed the following supplemental

Answer.

Pursuant to the resurvey of the lands described in the petition and in pursuance of the laws of Congress of the United States a patent for lots 11–14 and 15, in section 30, township 97, range 34, was on the 18th day of April, 1900, duly executed and issued by the United States of America to the State of Iowa under and by virtue of an act of Congress of September 28, 1850, granting swamp and overflowed lands to the State of Iowa and from the State of

Iowa to Palo Alto — day of April, 1900, execute and issue to the county of Palo Alto a patent for said lots; that prior to the commencement of this action and ever since the defendant, Hemphill, has been in possession of said premises.

On the 22d day of May, 1900, plaintiff filed the following

Reply.

That the title and interest which the defendants claim to the alleged lots is barred in that the plaintiff and those under whom he claims title have been in open, notorious and adverse possession of said land more than ten years prior to the commencement of this action and ten years before defendants asserted any claim of title thereto, and that said possession has been continuous; that the defendants made no effort to assert title thereto and are barred by the statute of limitation.

On the 11th day of April, 1900, the case came on for trial before the court, and the following proceedings were had:

15 *Plaintiff's Evidence.*

GEORGE SCHLOSSER.

My name is George Schlosser. I was born in 1857. Am a farmer and live on the south half of section 30, township 97, range 34; am the *the* plaintiff in this case.

Plaintiff offers the following exhibits, and it was agreed that the same should be received with the same force and effect as though the original of said exhibits had been offered:

EXHIBIT "A."

Being certified copy of patent issued by the United States to John A. Anthony for lots No. 2 and 3, section 30, T. 97, R. 34, containing 99.80 acres, dated October 10, 1874.

EXHIBIT "B."

Being a warranty deed dated June 27, 1884 signed John A. Anthony and wife, conveys the same Exhibit "A" to William H. Given.

EXHIBIT "C."

Certified copy of warranty deed of William H. Given, unmarried, to Frank L. Given, conveying the same as Exhibit "A," executed May 25, 1885.

EXHIBIT "D."

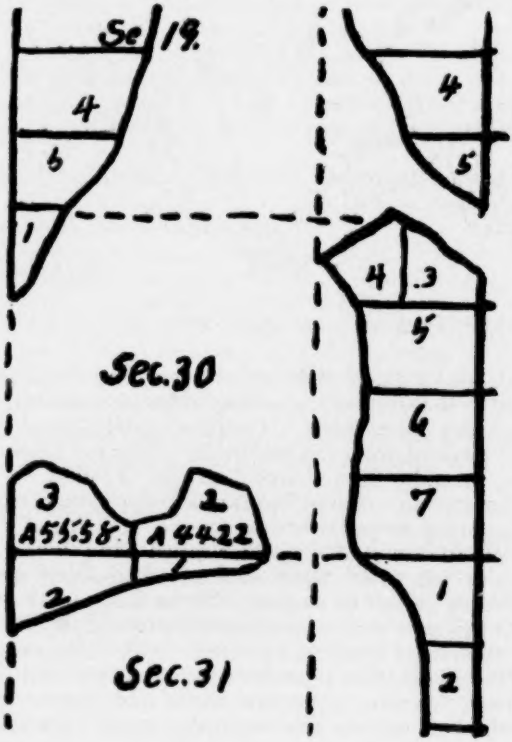
Certified copy of warranty deed signed Frank L. Given and wife, conveying to George Schlosser the land conveyed in Exhibit "A," executed March 17, 1892.

The defendants object to Exhibits "A" to "D," inclusive, as irrelevant, immaterial, incompetent, as they do not show or tend to show title to the land in controversy.

Plaintiff offers in evidence Exhibit "E," being certified copy of the platting of the original survey of township 97, range 34, certified by the secretary of state; also Exhibit "F," certified copy of official plats of same land, certified by the Commissioner of the General Land Office.

Defendants object to Exhibits "E" and "F" as incompetent and immaterial and not showing or tending to show title to the land in controversy.

EXHIBITS "E" AND "F."



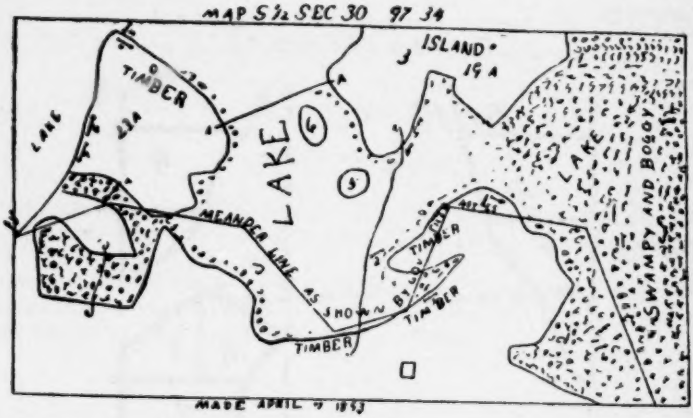
LEROY GROUT.

My name is Leroy Grout, age 60 years, residence Emmetsburg, Iowa, civil engineer and county surveyor for 26 years of
17 Palo Alto county, Iowa. In April, 1893, I made a survey of the south half of section 30, township 97, range 34, and made a plat of the survey. Exhibit "G" is that plat. It is a correct and accurate plat of the south half of section 30, and shows the high lands and meander lines and section lines and half section lines.

Plaintiff offered in evidence Exhibit "G."

Defendants object to the same as being incompetent and immaterial.

EXHIBIT "G."



I had the Government field notes when I made the survey. It was impossible to trace out the south half of the section and meander of lots 2 and 3 accurately. I approximately found the location of the meander lines from the field notes. The red lines is supposed to show the meander line of lots 2 and 3. I found the southwest corner of the section. There was no meander corner visible. I located a temporary meander corner on the west line of this section. It is right on the shore of the water called Mud lake. There was more or less water there, as the ice had about gone out. It
18 was slush ice on the surface. There was a bank of earth and rocks the same as are found on the shore of most all our lakes. The white portion of this plat represents land not covered by water or bog. The blue portion represents lake and bog, that is water and bog; the dotted portion represents water and grass. The eastern portion of the half section was wet, boggy land. We could not get

across at that time. The portion north of the line marked in red ink indicating the m-ander line, the white irregular point, is practically covered with timber and brush. At that time this was surrounded on the east, north and west by slush and water.

Q. And what was the character; was there any shore line there or was there simply a gradual decline on the east and north and west of that point?

A. On the east it was not so well defined all around if I can remember. On the east shore was low and willows and marsh grass on the shore. Upon the extreme north side it was somewhat higher; what we call an island covered with hazel brush and other growth. This point was mostly surrounded by water and marsh land. I was not familiar with Mud lake prior to 1888, have been there frequently since that time. I was there in 1891 and 1892, a comparatively dry season. Since then there has been a greater rainfall. I could hardly state intelligently about the body of water, it was about one-half mile across. I have drawn on the plat a square to indicate where Schlosser's house is located; I cannot say that that is the exact location. The land immediately north and west of this point is marshy and boggy and both times I was there it was covered more or less with water. East the land is boggy, and in a wet season is difficult to get over. Lost Island lake is south of this 20 or 30 rods.

I made no observation as to whether or not at one time Mud
19 lake was connected with Lost Island lake only from the field notes. A sand bank separates them and has ever since I first saw it.

Q. Is there apparently a connection between the two lakes, that is, is there an outlet running down toward Lost island at the ex-extreme southeast corner of this section?

A. There is not any regular connection that I have noticed. The land is somewhat lower near the eastern side. There are about 23 acres in this point on the northwest corner of the south half. There are about 19 acres of dry land in the island. I have been in this county 26 years and am quite familiar with the lakes. I first noticed Lost Island lake and lakes in that vicinity in 1876. I think the water has been receding since that time in all the lakes.

Defendant moves to exclude the answer of the witness as being immaterial and not applying to the land in controversy.

Cross-examination:

I did not notice any bogs or reeds growing in that portion of the land where dots do not appear. I made the survey in April. It was more than an ordinary wet spring. I would not say whether the boggy land could be artificially drained and suited for agricultural purposes. I think it would be difficult matter to drain Lost Island lake. The bogs are not of a sandy character, more mud and soil. I was on the land and made a survey for Hemphill in May a year ago. There was more water then than when I made the first

survey. There had been considerable more rain last spring than for several years.

Q. In your opinion was the water there of a surface character?

A. I presume that it was like it is all over these lakes, nearly every one of them have been dry for the last few years. Lost Island lake proper was never dry.

20 Q. You would not call Mud lake a permanent body of water as compared to that of Lost Island lake.

A. No. Lost Island lake is a great deal deeper and more well defined and well formed lake.

M. S. GREENE.

I am 50 years old. Reside in Spencer, Iowa. Came to Clay county in 1871. I own some land on Lost Island lake. Have known Mud lake since 1871. I know where Schlosser's home is located. I was recently on lot 2 and 3 in section 30, had plat Exhibit "G" with me at the time. Took photographs of the land. Photograph Exhibit "H" was taken with the camera standing at the place marked No. 1, on the plat and shows the shore line running southeast. Photograph Exhibit "I" was taken with the camera at the point marked No. 2 and shows the shore line northeast or the division line between the low land and the high land. Photograph Exhibit "J" was taken at a point marked on the plat No. 3, and shows the shore line running southwest. I put a handkerchief close to the meander corner, it shows on the photograph and is directly north of Mr. Schlosser's house. Photograph Exhibit "K" was taken at a point marked on the plat No. 4, with the camera focused southeast and correctly shows the shore line. Exhibit "L" is a photograph taken at a point marked No. 5, with the camera looking north across the lake and marsh. Exhibit "M" was taken at a point marked No. 6, with the camera directed north and shows the shore line. Exhibit "N" was taken at a point marked No. 7, was taken at the same place as Exhibit "M" with the camera pointed in the direction of the arrow at No. 7, and correctly shows the shore line.

Exhibit "O" was taken with the camera directed directly
21 northeast at the arrow No. 8, on the plat looking across the lake northwest. The men were in the boat at that time.

Plaintiff offers in evidence Exhibits "H" to "O" inclusive.

Objected to as not having been properly identified and irrelevant and immaterial.

The soil between the trees and water as shown by Exhibit "M" is stone and gravel, no vegetation; as shown by Exhibit "N" it is not so stony or gravelly. As shown by Exhibit "J" it is a dark muck of land. There is a very good bank I think. In 1893, I was on Mud lake in a boat. Northwest of Nos. 5 and 4 arrows on Exhibit "G" is open water which has the appearance of shallow lake.

Have seen the lake two feet higher than it is now; that was in 1878. There was no reeds and rushes in the lake proper at that time. I think it extends north something over a mile, northeast and northwest and from a half to three-quarters of a mile wide. The land immediately north of Schlosser's place, north and west of arrow "three" is boggy wet land, more or less grass and rushes. It was covered with water in 1878. At that time there was no rushes in the center; there were around the edges. The land on the east of this half section 30, is boggy, wet land; some water standing there. The grass hid the view of the water.

Q. Have you ever made any observation as to whether or not Lost Island and Mud lakes have been connected at one time?

Defendant objects as incompetent, and immaterial and calling for a conclusion and opinion.

A. I should say they had been connected at one time.

Defendant moves to strike out as a mere opinion and conclusion.

There is a sand bank between Lost Island and Mud lakes, 22 I suppose 40 rods wide between water. I think the time was when there was no water there. There is a highway along the bank. I have been over it in early times.

Q. Has the water in Lost Island lake receded from that bank since you went across there first?

A. Not much.

Q. Has the water in Lost Island lake receded from where its stage was when you first saw it?

A. I should think three feet or so. I think it commenced to fall in 1887. Would recede one year and the next would raise some.

I am acquainted with Trumbul lake and all the lakes in that locality. I know that Trumbul lake has been dry in the last six or seven years. Until that time it looked to me like quite a deep lake.

Defendant moves to exclude the answer as being a conclusion, incompetent and immaterial.

They run a sail boat on Trumbul lake, I think, in 1874. It has well defined banks. The roots of the trees, as shown by Exhibit "M," are exposed on the side next to the water.

Cross-examination:

These photographs were taken last Sunday. The numbers and arrows one to eight have been placed on the plat since. There was a cross made by Mr. Schlosser when we took the pictures. I was told that this plat was a portion of section 30, township 97, range 34. There had been a snow a week or two before the photographs were taken and it had all melted away. There is a great deal of land in the vicinity of this land that will be covered with water after much

of a rain or much of a snowfall. Trumbul lake is larger and covers a good deal more surface than Mud lake and is a deeper lake.

23 About five or six years ago Mud lake was entirely dry. Trumbul lake is in Clay county about a mile and a half from Mud lake. The outlet of Mud lake is into Trumbul lake. Trumbul lake drains into the Sioux river. Round lake is just south of Trumbul lake and drains into the Sioux. I always thought Trumbul lake drained into Round lake and from there into the Sioux. Round lake has been dry one season to my knowledge. I think five years ago Mud lake was cropped. Lost Island lake is the most permanent body of water in that country. I never seen a connection between Lost Island and Mud lakes. I first saw the lakes in 1871. There has been no connection since that time. The old stage road was established along the beach before I saw it. It is simply my opinion that there has been a connection between them. The land in Mud lake is more or less mud. I own land in section 1, township 96, range 35, bordering on the original meander line of Lost Island lake. There is some dry land between the meander line and the lake. James Valley built a shanty there. He and John McClellen made application for a resurvey. I resisted the application. I have a case now pending against Mr. Valley.

JAMES SPAULDING.

I am 60 years old, live one and one-half miles east of Schlosser since 1872. Have seen Mud lake frequently, crossed it on the ice. Was a sheet of water when I came there in 1872 a mile and a half long and sixty rods wide. Water was two feet higher then than now. Same stage of water kept up pretty well until five or six years ago. There was pond lilies and rice pretty generally growing over the lake. Have caught fish there myself. Have seen the water wash up to the trees along the point that projects into the lake two or three times. I found water north of Schlos-er's house. I attempted

24 to go from there with my team; it was frozen over and I got my horses in. Never could get over on the island until the last five or six years. Would have to get timber from over there when it was frozen up. In late years there have been some seasons when you could drive a team across. During the early years Lost Island lake was about three feet higher than it is now. I know where the old Palo Alto county road passes north of Lost Island lake. The road runs close to the side of the marsh. The ridge is three or four feet high and ten rods wide. It is sandy. There are willow trees, box elders and choke cherries part of the way.

Q. Are there any trees right opposite the narrowest point of the road between Lost Island and Mud lakes on the embankment?

A. There are some cotton wood along there; they were quite large when I came there.

It had the appearance of the lakes being connected at some time.

Defendant moves to strike the answer out as a conclusion.

The character of the dividing line around the island between the marsh and water and the high land is quite high. Some of it is a gradual incline opposite Schlosser's house about six feet above the high water. There was large trees growing on the island when I first saw it from a foot to two feet through. The marsh land on the east half of this half section was not farmed or pastured in an early time. It has been pastured in the last five or six years. It was grass and wet a portion of the years. I have seen a body of water completely cover it.

Plaintiff offers in evidence from the Government field notes on file in the office of the county auditor so far as the same related to a sub-division of township 97, range 34, on page 300, of said
25 record, concluding on page 317; also on page 321 to 399 inclusive, a certificate of the register appearing on page 400 and of the auditor appearing on page 401.

Defendant objects to the record as being incompetent, irrelevant and immaterial, and for the further reason that the field notes, so far as the meandering of an alleged body of water on sections 19, 20, 29 and 30, township 97, range 34, *are* concerned, they have been held to be incorrect and have been corrected by direction of the Secretary of the Interior, and a new survey of said section has been made by the United States, and the field notes introduced are not now recognized by the United States, the State of Iowa or Palo Alto county.

JAMES SPAULDING—Continued.

I saw water lilies during the earlier years on the east end of the body of water. They were growing there in the summer. Have seen them grow in shallow and deep water.

Cross-examination:

During the time I have lived there the water has varied; some years higher, some lower. The marshes some years have dried up; other times have been full. The year 1871 was rather dry. I don't think section 30 was dried up. I did not discover it dry in earlier years. The water that goes over section 30 starts on section 36 in Clay county on the south and runs into about forty yards of the east section line in section 30 in Palo Alto county. I don't call this lake along the east side of section 30 on map Exhibit "G." It has always had grass on it ever since I lived there, except one place right east of the island; there is a pond there. I don't remember of any place south of the island in which there has not been grass growing
26 during all the years from Mr. Schlosser's lots across the island. The land south of the island has been pastured about ten years. I have seen wild rice and grass west of the island, in the

earlier years it was weeds and rice. Never saw grass growing prior to ten years ago southwest of the island. Saw standing water there every year. I presume that portion southwest of the island would be called marshy or swamp. The lake puts in between the island and this timber point. Have seen part of that which I call lake dry six or seven years ago. The land was not dry between 1871 and 1890 to my knowledge.

Q. Now, what is called the lake proper, as a matter of fact, is on the north half of section 30, is it not?

A. Yes, sir. If that plat is correct the lake proper comes down on the south half of section 30 between the island and timber point. The lake proper does not surround the island. It only comes along the north and part of the west portion of the island. I don't think any of the island reaches the land. There is a marsh between the lake and island all around, without it is on the west side. The marsh is not very wide at the west point of the island; toward the east it is wider; might be ten rods. There is a difference in recent years in the condition of the land. The water has varied up and down, but not as high as it used to be. In the summer time the marshes have gone dry. That has been generally true all the years I have been there, with the exception of a year or two. I know of fish running up into the sloughs and marshes up there. I have seen grass growing up north and west of the island not very far from the island. Never seen grass grow all the way across until the last few years.

Q. Do you remember testifying in the case of Geo. Schlosser vs. Wallace Crookshank in November, 1893, in this court?

27 A. No, sir, I was not on that case at all. I don't remember giving testimony in this court concerning this land. I don't remember testifying in 1893 that several years before that I had seen a portion of Mud lake dry. I don't now remember that several years before 1893 I saw a portion of Mud lake dry. Three years is the extent it has been dry since I was there and that was five or six years ago. I think I did not say in 1893 that the lake was so dry that the stock had food there.

Q. Were you asked in that case this question: "Q. This mark in the center of the lake, is not that dry now?" "A. Dry enough so stock has food there in season."

A. I think that is a put up job. I think I did not testify to that. If that is the case I have forgotten it. I don't say that I did not, but I don't remember. There is no other James Spaulding that I know of.

Q. And were you asked by Mr. Cory the question, "It dries up and fills up just the same?" and you answered, "Yes, sir."

A. I do not remember.

Q. Do you remember testifying in that trial that you traveled over it in 1871 and 1872, and that you traveled over the dry parts of it at that time?

A. I do not think I testified any such thing. I did not travel over the dry part in 1871 and 1872.

Q. Were you also asked, "Have you seen any change in this tract of land from the time you first saw it up to this time?" and you answered, "Nothing more than it seems that the country is getting dryer than it used to be."

A. That might be the case; I do not remember.

The fact is the only change I have seen there is the country in general is getting dryer. Cultivation of the soil and break-
28 ing it up absorbs moisture. There was some very dry seasons. It might be I traveled over a portion of the lake in the early 70's. I do not remember of any change up to 1893 only the lowering and rising of the water. When I first came there I think there was a fence on the southwest of the lake. They used the lake on the north part of section 30 on the fence. The south half of the lake land of section 30 on the west end was used for pasture. The part of the plat marked lake southwest of the island was used as pasture in 1871. I was a witness in the case of The Chicago, Milwaukee & St. Paul Railroad Company *vs.* Palo Alto County, tried at the United States land office at Des Moines, Iowa, in December, 1898.

Q. Do you remember of testifying in that case that these lots marked on plat Exhibit "2" in section 29, as 12, 13, 14 and 15, were dry and always had been?

Plaintiff objects as not proper cross-examination.

A. I think my answer was a portion of them were dry; about one-half.

When Hemphill settled up there on that land on the north part of section 30 I had some of section 30 in pasture.

Q. And you and he had some disagreement over that, didn't you?

A. I don't know how anybody could avoid having disagreement with him.

Q. You have had more or less disagreement with Hemphill during the years he has been there?

A. Why, he wants to blow at me occasionally. I keep away from him all I can. Have no dealings and never expect to have. Our relations have been and are unpleasant.

Redirect examination:

The fact is he has kept the neighborhood in an uproar ever since he landed in that country, trying to snoop around
29 and get all the land he could from his neighbors. He is the chief of squatters up there. I have been told where the northeast corner of section 30 is. Do not know that I have ever been to it. My pasture was on the north half of section 30. There was water standing frequently on the east portion of the half sec-

tion. I have seen it covered with water continuously where it is marked in blue, sometimes in the summer and sometimes in the spring. I have seen the southeast corner of the section. There are springs in the lake. One near the east end of the south side out beyond section 30. One on section 20 near Lee Hemphill's. One on section 29 near Alex. Hemphill's. One out in the lake, where Schlosser piped from when the lake was dry. He had a tank there, on the west side. The outlet of the spring is in the lake.

Recross-examination:

The tank is in Clay county west and a little south of the point. I knew the lake went dry sometime years ago, but did not know which part dried up last. The water was not running from the spring at the time I was there. There was water running along the ground from the spring. I knew of Crookshank having a well down in the marsh east of the island; I think on section 29. I remember talking to the county auditor of this county shortly after Mr. Hemphill claimed to have bought the land in section 30. I do not remember whether I told him the land was worth more than Hemphill paid.

Q. Do you deny, Mr. Spaulding, that you said that all that land through there was worth $20 per acre.

A. I do not remember. Hardly think I did.

FRANCIS FITZGERALD.

Am 63 years old. I live twenty rods west of Mud lake in Clay county, one mile and a half from Schlosser. Came to Clay county in 1871. Have been on section 30 occasionally. Know the character of the land. Have been on the point of timber frequently. Have examined the shore line on the west side. Raises abruptly from the water. I think slants slightly; gradual slope. Quite a number of trees along the bank six to twelve inches in diameter. They are four or five rods back from the water now. The beach between the water and trees is gravelly close to the bank. Further out it gets muddier. The roots of the trees along the shore line are exposed, I presume by the washing of the water against them. I have seen the water up against them. Not in late years. The land or water that lies between the land and Schlosser's land in an early day could not be crossed over while there was water there. Not a clear body of water; kind of slough. The grass projected up in places. I went over there in the winter of 1872 to get wood; bought it from Anthony.

Objected to as immaterial.

The land was covered with timber in an early day. The land on the east of the plat marked lake was covered with water in an early day. Of late years it is a good deal dryer. I have never been on it. Coarse cane brake was growing up in it.

Q. Did the water in it seem to be continuous or not, that is, was it a clear sheet of water or was there grass growing up in it, grass and cane brake mixed.

A. I think so, more cane brake than anything else.

Cattle were not pastured there in early days. In former years the lake northwest of the timber point was a clear body of water. I did not see grass or water lilies growing there in the early days. At the present time it is all marsh and bogs, miscellaneous mixed up stuff. That is true of the entire body of water. Wild rice
31. growing there. The depth of the water varies at different times of the year. I think it has been four or five feet in early days. This mud you could hardly measure or call it water. I have never measured it. Fish live in the lake, pickerel and buffalo.

Cross-examination:

I live either on the outlet or inlet of Mud lake, I do not know. Mud lake drains into Trumbul lake, Trumbul lake into Swan lake. Mud lake has well defined banks along the west and south part in Clay county and in Palo Alto county about a mile. Have seen weeds, rushes and grass growing through the water all over. I have seen mighty variations; it has changed with the seasons, wet and dry.

Q. And some years in earlier years you saw a large part of Mud lake dry, did you not?

A. I have, totally dry there seven years ago.

In earlier years I never saw it nearly dry. It was dryer some years than others. Part of it might have been dry nine years ago. I cannot say as to whether there is well defined shore over at the island or not. I do not know whether there ever was a time when the weeds and grass did not come through in the fall. I think there was a few years when it was very wet in the fall, when grass did not make its appearance. It might have been fifteen years ago.

Q. And before that time every fall, as a rule, the roots and grass and cane came up through the water, did they not?

A. Occasionally, with this exception, there was some very wet years.

Q. Was not that true with reference to the greater part of Mud lake?

A. It would vary; the north part was more grass; the lower land was further south.

Q. Take the lake as a whole in the latter part of the season
32 the greater part would be covered with canes, rushes and grass?

A. Part of it; I could not say how much.

Q. North of Schlos-er's land?

A. Well, yes, but that was the highest part of the south end; more lower land in the north.

The greater part of the water of Mud lake is in Palo Alto county.

The entire bed of Mud lake was dry up to seven or eight years ago. They tried to put flax in there, but it was drowned out. I testified in the case of Grant and Eaton *vs.* Hemphill in 1891.

Q. Do you remember, Mr. Fitzgerald, in that case being asked this question: "Now, has Mud lake any defined shore," and you answered: "No, sir." Do you remember that?

A. If I was asked in regard to the north part I might have made that answer; otherwise I would have answered different. I do not remember perfectly. I made some answer, what I supposed was correct at that time. I think my recollection was better in 1891 than it is now.

Q. Isn't it true that the so-called shore or margin of Mud lake would vary from year to year and depend on the amount of water?

A. To a certain extent, yes, sir.

Mud lake looked like a good, clear lake when I first saw it. It turned out to be a marsh or pond.

Re-direct examination:

I think the lake is a mile and a half square at the present time. It has an outlet at high water. There are some springs. The principal one is in Clay county north of Schlosser's house. I don't know of any other.

33 NICHOLAS RICE.

I have resided on section 29, township 97, range 34, for sixteen years. Am familiar with Mud lake and the dry land on the south half of the section. I know where the meander lines are supposed to be. Am familiar with the point marked on plat Exhibit "G" as twenty-three acres and with the island. Have been over there frequently. In 1882 the water was pretty high. The fore part of the summer it was up in the trees; remained there until in August before it went down. It did not go down below the roots of the trees. It played along there until it froze up that year. From 1882 to 1890 it averaged along about a rod from the roots of the trees. The portion southwest of the island was generally covered with water up to seven or eight years ago. The eastern portion of the half section was generally covered with water in the spring, but receded toward fall. I did not know of it being pastured in earlier years, but has the last six or seven years been pastured by George Schlosser. The lake went dry one or two years five or six years ago. Had several dry seasons then. The water has been receding in the last six or seven years. The southeast of Mud lake has well defined banks. The north and northeast portion of the timber point of twenty-three acres on the west side of the half section is a well defined bank. North of Mr. Schlosser's house is a well defined bank. Mud lake proper extends down between the timber point and the island a

short distance. Does not go down to Schlosser's house. There is a sandy bar between figures 5 and 6 that is passable when the water is down to about two feet above the level south of it. I know where Lost Island lake is and the divide between Lost Island lake; should think it was ten or twelve rods wide. No sod there. Nothing but cockle burs. The soil is sandy now the same as when I first saw it. North of the sand bar is a boggy marsh. Lost
34 island is on the south. It extends about eighty rods along. From 1882 to 1890 the body of water which has been indicated as the lake proper was a nice clear lake. There was practically no weeds or grass in the center of the lake; a few patches around the edges.

Defendant moves to strike out the answer as a conclusion and incompetent.

I am familiar with the lake northeast of the 23 acres timber point. Exhibit "K" correctly represents the shore at that point. Exhibit "M" I should say, represents the shore line west of the point. Exhibit "N" represents the same point south, taking in a portion of the west shore. I fished in the lake 7 years ago. Caught buffalo when the lake was receding. Caught pickerel before that time. I was there last Sunday; there was plenty of water there west of the point. Came within a rod and a half of the shore line. The lake proper is a mile and a half long and three-fourths of a mile wide. There was timber along the south and east side of the banks. None on uthe north and west. The timber would average from a rod to 15 rods wide. Mostly cottonwood and ash. Trees 6 to 12 inches in diameter. The trees on the island were from half to two feet. John Anthony occupied it when I first knew it.

Q. Did you ever notice whether there was a depression of the lake or pond right here on this plat "G," to the extreme right side of the half section?

A. Yes, sir; there is.

Cross-examination:

I fished there in April, in August and one time when it was froze up.

Q. The fish came out from Trumbull lake into Mud lake at the inlet?

A. Well, not at that time.

35 Q. What time was that?

A. That has been about 10 years ago.

There is no fish in Mud lake now except what comes up in the spring during the high water. Mud lake drains into Trumbull lake and Trumbull lake into the Sioux river. The water in Lost Island lake is about 2 feet lower than when I first saw it. Mud lake dries up much quicker than Trumbull lake. I saw Mud lake entirely dry one season. The last portion of Mud lake that dries up is west

of the point of 23 acres timber or around on the south half of the section 30. The last 6 or 7 years there has been no water on the south half of section 30 in the fall or middle of the summer. In the spring it has been wet. It has been pastured in the summer and fall but when the snow goes off and the spring rains come there would be water there.

Q. Is not that true of the table land all over the northwest part of Iowa.

A. Yes, sir.

Q. And many places where there is no pretension of being a lake or pond in the spring of the year and when the heavy snows have melted and spring rains, there would be large sheets of surface water?

A. Yes, sir.

Q. And at such times as that there is water on the south half of section 30?

A. Yes, sir.

There never was water over the island. I should say there is 40 acres in the island that the water never covers. There is about 15 acres on the point as shown by Exhibit "G" that the water never covers. I don't know exactly where the half section line of section 30 running east and west is in relation to the island. The sand bank I testified to would be on the south half of section 30 to my judgment. I don't know whether Exhibit "O" shows the water in Clay county or not. If it was taken from the point where No. 8 and the arrow appears on the plat Exhibit "G," with the camera pointing in the direction the arrow points then the photograph would be the waters of the lake that is in Clay county. Photograph Exhibit "N" indicates the shore along the line or from near the line between Clay and Palo Alto county. The land lying between Lost Island lake and Mud lake is dry hilly land and quite a hill running each way into each lake. The sand bar is a short piece of land or road at the southeast corner of section 30. I know where Edward and William Beatty live and where Robert Beatty's shanty is and where the Hemphills live and that all that land was originally surveyed as being in Mud lake. The dry land was never in the lake, of course. All the land cultivated by these persons is dry land. In 1882 there was heavy rains in May and June. I have seen a plat like Exhibit "2" purporting to be the survey made by Mr. Barber in 1898. My house is situated on the southeast of the southeast of section 29, and I own lot 8 in section 29. Have had in possession for a number of years a portion of the land originally meandered as Mud lake, immediately north of lot 8 in section 29. I at-empted to enter that as an adjoining farm homestead and brought contest in the United States Land Office against the homestead entry of Alex. Hemphill for that land; the case is now pending in the United States Land Office. I had the Hemphills arrested for assault, tearing down fences and stealing corn. The fence and corn was on that portion of the Barber survey included in Alex.

Hemphill's homestead entry. I brought suit against them for $5,000 damages.

Re-direct examination:

There are three springs in the lake, one west of the point
37 near the line between Clay and Palo Alto counties, one on the southeast side of the lake close to the east end one near Lee Hemphill's residence. The water from this spring runs into the lake. The lake proper extends north and to the east of the island.

Objected to as calling for a conclusion.

East of the island is a boggy swamp connected with the lake proper.

Re-cross examination:

I don't mean to say that the springs are sufficient to keep the amount of water in the lake there is there. As the country around becomes cultivated and absorbs the moisture the lake dries up.

FRANCIS FITZGERALD, re-called.

I made a mistake when I said the greater part of Mud lake was in Palo Alto county. I think the greater part is in Clay county.

JOHN CROOKSHANK.

Age 69 years. Have known Mud lake since 1868, have been acquainted with it since that time and have seen it frequently. Did a little fishing there.

Q. What would you say was the appearance of Mud lake, at the time when you first saw it in 1868, that is to look out from say this timber point on the map here, Exhibit "G," on the northwest corner, now looking out across the lake from that point to the north and the northwest?

A. This looked like a lake of water, and in the summer time you would see lilies in it, and in the winter time there would be solid ice; the lilies seemed to die down or freeze up; in the spring of the year it was a big high lake.

I don't know how deep the water was where the lilies grew.
38 I live east of Schlosser's house half a mile. Have trapped and hunted along the lakes. I caught fish in Mud lake in the winter time, they got froze in the ice like and we grabbed them out with our hands. Once in the spring of the year I caught some pickerel around the point. The land on the south half of section 30, marked swamp on Exhibit "G" is marshy and boggy. When I first came stock would not run on that portion. The first time I knew cattle to go over on the island was 15 or 16 years ago. I had

to wade through the water to get them back. The land on the east when the water is high comes over it. When the water comes in it backs around, comes in between the island and timber point and backs east. The inlet comes in over section 32 close to the southeast corner of section 30, on the boggy land. Cattle can cross all over the land now. There was water all over the south and southwest of the island and between the island and Schlosser's land in 1868, when I first saw it. I think it was a part of Mud lake. It was connected with the upper part of the lake. There was no bar between the island and point at that time; it was all a clear body of water. Could not get from Schlosser's land across to the island in the summer time. I got wood off the island in 1870. Have set musk rat traps around the point of timber. From the point southeasterly to Schlosser's house was a well defined shore line. There is no well defined shore line where the check marks are, it is marshy, weeds and rushes.

Q. South of this body marked lake, lying between the island and Schlosser's land what is the character of the shore line where it is marked timber. Is it abrupt or gently sloping?

A. Well, pretty steep, a pretty steep bank along there.

At the point marked No. 1, where the arrow is it is sloping gradually. It is a well defined shore line north of the point
39 marked timber southwesterly along the lake, except there is gaps like through the bank and a low place along there. There is willow trees along the shore line. When the water is up it comes right up to them. The beach from the water line to the trees is gravelly. There is quite a little timber until you get down to the marsh like and then it gives out. I should judge the water was 1 or 2 feet lower now than when I saw it in 1868. Mud lake is about one and a half miles long and it might be 80 rods wide. There is a spring opposite the timber point, and there is a spring on the east half of section 30 and a few others around, I cannot locate them. There is some good farming land between Lost Island and Mud lakes. Mr. Schlosser's land is between them. At the southeast corner it has a sandy bank. The marsh I speak of is toward Mud lake from the division land. South is Lost Island lake. The bar is about 10 rods wide and 7 or 8 feet above the water's level. There is some difference between the lakes up there, some years one is higher, some years the other is highest; they have different inlets. Mud lake has been from 5 to 6 feet deep to dry. Five or 6 years ago it was dry and they sowed it to flax; the flax didn't grow to amount to anything. The soil where the flax was sowed was regular mud bottom. Mud lake was dried up for 2 or 3 years in dry seasons. It is wetter now, more water than there was then.

Cross-examination:

I know A. W. Barber, the deputy United States surveyor, who made the survey of 1898. I made affidavit for him as to what I

knew of the land. One summer all of Mud lake was dried up. The deepest part of Mud lake is along the county line. The deepest hole is in Clay county across the line, it is quite a considerable deeper than in section 30. The marsh or inlet lies up through the north half of section 30. About 30 acres of the island was never
40 under water and about 20 acres of the timber point; I am guessing at both of these.

Q. Now, in the time you have known it, Mr. Crookshank, the east half or the east 80 of the south half of section 30, how often has it dried up?

A. Why, more than half the time it would dry down during the summer.

Q. More than half the summers that portion of section 30 has dried up until it was marsh land and no water on it?

A. Yes, sir. There is no material difference between the east half of the south half of section 30 and the other portion of the south half of section 30; one dries up about as quick as the other. Those cattle crossed over to the island from section 29 on the north half of section 30; the sod seemed a little dryer or it was better sod. Before this was fenced 11 or 12 years ago we mowed grass on this marsh; it was hard work for the horses to travel because it would sink with them. We put up two stacks of hay.

It was about the center of section 30, some on the south and some on the north half of the section. That was 16 years ago; I am guessing at this now. I dug a well on section 29, about 10 rods from section 30, on the unsurveyed land down in the marsh part, it was about as low as the marshy part of section 30; I dug 8 feet to get the water. It furnished plenty of water, I used it until last year, dug it 8 or 10 years ago. I knew the land of the Hemphills and Beattys, it never was covered with water except there was a slough running down through Alex Hemphill's, a ravine, during high water it would overflow. I was a witness in the case of Schlosser *vs.* Crookshank and of Grant & Eaton *vs.* Hemphill. The testimony was taken in 1891, I think.

Q. I will ask you, Mr. Crookshank, if in the case last referred
41 to you were asked this question, referring to Mud lake: "You say it was pretty near dry last year." To which you made the following answer: "Yes, sir; the whole lake was dry last year, excepting a little piece, there was a few buffalo fish in it, and the lake dried up."

A. I remember that was the case of Mud lake one year. I have known it to be entirely dry at two different seasons.

Q. I will ask you if in the same case you were asked the following question: "Do you mean that the land could have been mowed and pastured in 1850? A. "I think it could, just the same as it can now, if it was a dry summer."

A. I do not remember, you know, but I presume that was all right. I think it could have been mowed and pastured in 1850 if it was a dry season.

There was some trees along the sand ridge on the southeast part of section 30 between Lost island and Mud lake, but they had been cut down along the edge of the sand ridge. There has been some big trees. I recall finding a section corner between the southeast corner of section 30 and the southwest corner of section 29 in connection with Mr. Barber. I first observed this stake in 1868, it was right opposite that portion of the ridge where there is no stumps or trees.

Q. I will ask you if in the affidavit that you made for Mr. Barber the following statement appeared, and if you made affidavit to the facts contained in this statement: "That the only lake here is Lost Island lake, which has a high, sandy, wooded ridge for its north bank, and that said ridge and bank are all south of the line between sections 19 and 30, and that on the north side of said bank is a grassy marsh, now dry, that I have seen that marsh covered with water only once the last 15 years, after a very rainy spell, and that the lake lands in section 30 are mostly of the same condition, except a tract further west known as Mud lake, which is all liable to become entirely dry every dry season?"

42 A. Yes, sir.

Mr. A. C. PARKER: I ask that the answer be stricken out as made before I could object, and I object to the question asked as not the best evidence, and as incompetent, irrelevant and immaterial and not cross examination.

Q. What would you say as to the facts stated in that question being true or not?

The plaintiff makes the same objections to this question as were made to the last preceding question objected to, and as calling for a conclusion of the witness.

Q. The facts being the statement I have just read?

A. Yes, sir; that is right.

Q. The land described in that question is the land immediately north of this neck that you say, or sandy beach that is about 10 rods wide. Did you further state in the affidavit referred to, as follows: "I further depose that there is no channel, connection, or passage through the said ridge aforesaid by which water has appeared to ever pass—between the deep, permanent waters of Lost Island lake, and the grassy flats and shallow ponds north of the ridge, which were wrongfully mapped as a lake, and connected with the real lake, and that there was a stage road east and west on that ridge when I came here in 1868, where by the map it shows one continuous lake?"

The plaintiff objects to the question as being not the best evidence, and as not cross examination, and calling for the conclusion of the witness, and as incompetent and immaterial, and a statement of the conclusion of the witness.

Q. You so testified, did you, in the affidavit?
A. Yes, sir.
Q. And that statement is true is it?

The plaintiff makes the same objections to this question as were made to the last preceding question objected to.

43 A. Yes, sir.
Q. I will ask you if in the same affidavit you made the following statement:
"I further depose that George Schlosser, who owns lots 2 and 3 in section 30, has and uses a large fenced pasture in the middle of section 30, and kept a large herd of stock there; that two or three years ago a dry season compelled him to drive his cattle daily across said lots 2 and 3, over to the large lake in section 31 to furnish them water, on account of the complete drying up for several weeks of the ponds or other bodies of water, which in wet seasons occupy a small part of said section 30?

The plaintiff makes the same objections to this question as were made to the last preceding question objected to.

A. Yes, sir.
Q. And that statement is true, is it?

The plaintiff makes the same objections to this question as were made to the last preceding question objected to.

Q. Yes, sir.
The banks around Mud lake are not so high as those around Lost Island lake. The land between section 19 and Lost Island lake is mostly marshy; what we call Mud lake is a little narrow lake.

Re-direct examination:

Mr. Barber and Ed Beatty were present when I made the affidavit for Mr. Barber. He wrote the affidavit. It was at my house. My family may have been present. I don't remember whether I read it before I signed it. There are some trees on this beach up near Lost island. The balance of the beach is sandy. The beach is about eighty rods long. The trees are on the north part of the strip, some on both ends. Mud lake has two inlets, one from
44 the north comes from the northwest, one from the southeast. The largest inlet is the northwest one. They drain, maybe, 5 or 6 sections, I don't really know how far north it does go. When my cattle went over on the island and I cut the grass it was pretty near a dry summer. They went in over north half of section. I don't know that the land could have been pastured and mowed in 1850, I only came here in 1868, was not in the country in 1850. The land from the south half of section 19 slopes down from the marsh a piece.

Q. Mr. Evans has referred to your testimony in the Grant case; I will ask you if this is not all your testimony on the subject matter to which he has referred:

"Q. What kind of land is that between the south line of section 19 and Lost Island lake? A. It slopes down to the marsh for a piece, then the lake is a long narrow lake; it is not such a lake as the Government has platted there by any means. Q. What kind of land is this down in here between the supposed south line of section 19 and the north bank of Lost Island lake? A. It is mostly marsh down around this Mud lake; what we call Mud lake is a little narrow lake. Q. You don't understand me, you know where the supposed south line of section 19 is? A. Yes, sir. Q. What kind of land is it immediately north of the bank of Mud lake, and immediately south of the south line of this supposed section 19? A. It is low land after you cross 19 down towards the lake. It runs down onto a flat lake until you get to Mud lake; there is a pasture there known as the Cameron pasture; there is a nice piece of dry land in there and some sloughs." Isn't that your entire testimony on the subject matter to which Mr. Evans referred in this question.

A. I think so.

Q. The person asking the questions, by mistake, used the
45 word Lost Island lake instead of the word Mud lake, did he not?

A. Yes, sir; that might be.

Recross examination:

The land now is dryer and solider than it was in 1868, cattle can travel over it; the banks are about the same; the sand ridge between the marsh and Lost Island lake is about two rods wider; I am guessing at that. Schlosser's land is northwest of the beach.

Redirect examination:

In my best judgment the bar lying between the swamp and Lost Island lake has been formed by the action of the ice for successive years.

Defendant moves to strike the answer out as being the conclusion of the witness, and as incompetent, irrelevant and immaterial.

JOSEPH HANSON.

I live in Clay county and have lived there since 1881. Have observed the lay of the land and the water in the south half of section 30, township 97, range 34, since 1881. It looked like a clear body of water at that time. In 1884 or 1885, I observed the shore line along the timber point, it was a well defined shore line. The water was pretty well up to the roots of the trees. It has receded from the

trees 12 or 14 feet. The beach is gravel-y and stony. Northeast of the timber point it is same. To the northwest the banks are a little more abrupt and higher. As you come down east of the tract it is inclined to be boggy and marshy. There was water between the timber and Schlosser's house, more than there now.

46 Cross examination:

Mr. Schlosser had a pasture on the south half of section 30 about 8 years ago. There was a large pasture there. Cameron had a pasture on the unsurveyed land, and Spaulding a pasture on the north side of Mud lake.

J. K. OLIVER.

I live in Clay county, have resided there since the fall of 1871. Live two miles from Mud lake. I got timber there in the winter of 1871 and 1872 from John Anthony. I don't know anything about the lines but I got it on what is known as the island, there was an impassable channel between his land and the island.

Q. How did you get on the land?

A. Well, to investigate before it froze up we got on the best we could without drowning, or getting in all over; it was very muddy but by a good deal of exertion we got a few light pieces of timber there. That was the first of November or last of October, it was the dryest year we had until 7 or 8 years ago. There was a sheet of water over west there. I called it a lake just the same as Elbow lake and Lost Island lake.

Defendant moves to strike out the answer as incompetent.

The banks around the timber point are well defined. Mr. Anthony kept the postoffice. It was pretty dry that fall and until the next year. About June we began to have the usual rains; I was surprised in looking over the ground to see so much more water than when I got the timber. When I came here, after 1872, we kept having a succession of rainy seasons and the water raised in Lost Island lake; that kept up seven or eight years; then the water in
47 Lost Island lake began to recede; that kept up two or three years; then it began to rain heavier than ever. The outlet was impassable for stock until seven or eight years ago; it has been constantly receding from that time up to the last two or three years; this fall they are higher than they was before.

Defendant moves to strike out the answer of the witness as conclusive and incompetent, not relating to the land in controversy.

Cross-examination:

In the fall of 1871 we got over to the island, got our timber and got out again. It was an awful job. That was before it froze up. I

own land on the meander line of Lost Island lake over on the other side of the lake. I have some of the unsurveyed land in my possession. I would not undertake to say how much or how little, whether there is one hundred acres or not; I don't hardly think there is 200 acres; I don't know how that is.

Objected to as not cross examination.

I have made no resistance to the application for survey. I was a witness in the case of Schlosser vs. Crookshank, tried in 1893.

Q. Did you say in that case when asked the following question: "Did you know that cattle could pasture on there? A. Why, yes, over where I went, that was in 1871, yes, sir. Q. And all over the east end of it? A. Over from Anthony's house to the place we went across to Lost island I should say that it could be pastured."

A. Why, I don't see how I came to say that because I never actually thought anything could get through in the summer season. I can't understand it; it seems strange to me; I don't know cattle had been kept there and why should I say it.

48 I testified in that case that I would not say how large the lake was, but that it was awful shallow. I did not know at that time that was all one lake; it was a mystery to me how much was Mud lake and how much another lake.

GEORGE SCHLOSSER, recalled.

I first visited the south half of section 30 in 1889, the spring of the year; I was hunting, found plenty of water for ducks right back of the house on the blue land, as represented by plat Exhibit G; out west and north was a clear body of water. There was a body of water there running nearly clear across the section. It covered over a half section. There was no weeds growing up in the water. Went on the water with a boat shooting ducks. The shore line around the timber point is well defined. The water backed up north of the house. I bought the land in 1892, lived on it two years before I bought it. The first year I fenced the timber and some of the southwest corner; built it out in the water some; that was in 1890. Waded out about three feet. In the spring of 1892 it got so dry you could walk across, as shown from A to A. Last year there was water all over the low piece here; the cattle nearly drowned. That portion of the land marked in blue on plat G had water all over it. It came right up to the roots of the trees. There is a spring up near the county line. It took 240 feet of inch piping to hold the water piped out to it to get the water to the shore. There is a vein of water comes out there as big as my arm. Before I put in my tank we had to run the cattle down to Lost Island lake to water them. After I got in a tank we watered 110 head of cattle there. The Beatty boys had two springs up on the north half of section 30. They could water 100 head of cattle during a dry year. The inlet comes in in a northeasterly direction. It draws from what we call

49 Twelve Mile lake; drains the whole country. Twelve Mile lake must be eight miles from Mud lake; has probably two

or three hundred acres in it. Mr. Given always talked to me as though he claimed all the land in the south half of the section. Claimed that all that land belonged to my lots 2 and 3.

Defendant moves to strike out the answer as immaterial and not proving title.

I treated it as mine up to the time these squatters commenced squatting on it.

Defendant moves to strike out the answer as immaterial and not proving title.

(Witness testified as to the photographs Exhibits G to O, inclusive, substantially the same as witness Greene.)

I never fished in Mud lake, but have caught fish when the water backed up right back of my house. There is a sort of raise right across from A to A. The ridge does not run quite across; there is a raise about half way or two-thirds until you strike a sand bar that raises out in the lake; seems to be a channel that raised up there. The lake extends around to the bar.

Cross-examination:

I moved on the land in 1890; used all the south half of section 30 outside of the water. The water backs over the rest of this that is marked blue on the plat Exhibit G. Whenever there comes a freshet in the spring of the year before the frost is out the water always comes out of the main lake and backs up over the bottom; that was the condition when Exhibit G was drawn. There was more water when Exhibit G was drawn than when the photographs were taken. Exhibit G was made in 1893. It was dryer in 1892. I crossed from A to A in 1892. In the latter part of the season of 1892 I pastured the land. I don't think the cattle went across from A to A in 1890, but they did in 1891. In 1892 they could get all over the entire half section, except what I had in flax. The places marked 5 and 6 are low places. They are the only pond holes on the south half section. I don't think the land around the places marked 5 and 6 could have been mowed in 1893. A man might walk through there, but it was soft. I saw a map something like plat Exhibit 2, the land marked on plat 2 as lot 15 is low boggy land. There was times since I lived there when the water was all over it; in the dry seasons it has been dry. I have pastured it every year.

Objected to as not proper cross examination.

The land on lot 11 is a little lower land, more wet than on lot 15. Never mowed either lot. It could have been mowed when the lake went dry. I should say two-thirds of lot 11 is covered with water now. There is not a great deal on lot 15, I don't think there is any.

Lot 11 did not dry up last year. Some years it has dried up. There is water on lot 15 in the little bog holes. I suppose it settled there from the melting of snow lately. Except the part of lot 12 designated as high and timber it is also covered with water at this time. I should think there would be twenty-five acres of lot 12 with water on it now, and over half of lot 13 is under water. If you went out to the half section corner of lot 14 you would have to go out in the lake. There is no water in 14 except what is in the lake. The old lake road went clear around the point. There is a part of the land that is within the meander line that is under the water, that is the east part of lot 3; must be three or four acres of it. All the land on lots 11, 12, 13, 14 and 15, except a little corner of the lake on 14, was pretty well dried up in 1892. Don't remember just how it was in 1893; it was entirely dry five or six years ago. It has not all been dry since. Last summer the water stood in sheets across
51 most of these lots. I don't remember how it was summer before last. I don't know for sure how many acres there are in lots 2 and 3, only what my tax receipts show. Taking the meander line as a boundary, there is only 99.80 acres in the two lots. I am claiming the whole half section on the strength of having 99.80 acres.

Plaintiff moves to strike out all evidence with reference to the map Exhibit 2 as incompetent, irrelevant and immaterial, no proper foundation has been laid and is not proper cross examination.

I am also claiming lots 7 and 8 in Clay county, as shown by plat Exhibit 2. On most of the half section last year Hemphill's cattle was in water up to their necks early in the season. I have drove a horse across the point marked B B and dragged posts across it. The signature to Exhibit 3 is in my handwriting, but there is some added below there that was not there when I signed it. The possession of the land was not there.

It is agreed that the court may consider as offered in evidence the rules and instructions of the Department of the Interior in existence at the time the General Government subdivision of the township in which the land in question is situated was made and the court may take judicial notice thereof.

Defendant's Testimony.

P. M. MOORE.

I am county surveyor of Clay county, Iowa, and have been for eight years. Am acquainted with the land in section 30, township 97, range 34. I have recently been surveying on the land; I made plat Exhibit 4, being a plat of the south part of the section. I had with me a plat of additional Government survey of this land. Ex-

hibit No. 2 is that plat. I took levels of the land in the south
52 half of section 30. I started from the water level of Lost Island lake, which is immediately south of section 30; I took the levels on the 30th of March and 6th day of April, 1900; on the 30th of March the ground was covered with snow; the figure 1 on plat 4 is the place from where I started to take levels; it is the water level of Lost Island lake. The figure 2 is on the ridge between Lost Island lake and the swamp land on the north; it is 7.70 feet above the level of Lost Island lake. The difference between the level of No. 1 or Lost Island lake and the land at the various numbers of the plat is as follows:

No. 3, 1.62 feet below the level of Lost Island lake.
No. 4, 15.63 feet above the water level.
No. 5, 2.52 feet above the level.
No. 6, 1.12 feet below the level of the water.
No. 7, 9.73 feet above the level of the water.
No. 8, 14.08 feet above the level of the water.
No. 9, 9.23 feet above the level of the water.
No. 10, is 12.58 above the level of the water.
No. 11, is 18.93 above the level of the water.
No. 12 is .77 below the level of the water.
No. 13 is 24.23 above the level of the water.
No. 14 is 19.23 above the level of the water.
No. 15 is 9.75 above the level of the water.
No. 16 is 3.90 above the level of the water.
No. 17 is .67 below the level of the water.
No. 18 is 11.95 above the level of the water.
No. 19 is 8.80 above the level of the water.
No. 20 is 4.35 above the level of the water.
No. 21 is 5.53 above the level of the water.
No. 22 is 1.70 above the level of the water.
No. 23 is .80 above the level of the water.
No. 24 is .60 below the level of the water.
No. 25 is 6.20 above the level of the water.
53 No. 26 is 5.68 above the level of the water.
No. 27 is the water level of the lake again.

The land I have marked swamp was covered with snow the first day I was there; the second day there was no snow, but there was water on it; the bogs and grass showed up through the water.

Q. Was that true generally all over the part that is marked swamp?

A. It is possible that there was a noticeable extent that there would be a wider space between the bogs than some other.

In the spring of 1894 or 1895, I surveyed Mud lake, in Clay county, mostly upon section 25; there was no water on the lake bed at all excepting at the spring near the range line of section 25. The spring is in Clay county; the piece of ground 4 or 5 rods around the spring that was wet would become dry in as dry a season as we had in 1894. Except that little spring the waters in that locality

are surface waters that come in from the surrounding country. The soil was black; it was dry then; it was not muddy; it was dry and dusty. The land outside of the dotted portion of the map is simply a continuation of the marsh off to the north and east, covered with this growth of marshy vegetation on the north half of section 30; the portions marked high land has not the appearance of ever having been covered with water in the history of man; anyway about 30 acres of the land has never been covered with water, and about all the land on the island could be successfully cultivated. The east side of the south half of section 30 is a continuation of the swampy, boggy tract. When I was there the second time it was immediately after the snow had melted away.

54 Cross-examination:

W. L. Hemphill and two other fellows that I did not know assisted me in making the survey; Hemphill carried the leveling rod and those two other gentlemen the tape. The leveling rod measures the altitudes; in this case the rod slides up, and when I give the signal he turned a thumb screw and fastens it and brings it to me so I could read it. It is possible that I could not tell whether the thumb screw had been moved an inch or two or a foot. Mr. Hemphill is one of the parties to this suit. To get the level I dug into the sand so that the water would be quiet and selected that place as a level. I had the level standing at a place nearly midway between numbers 3 and 1, and signalled the leveling rod to a position at a certain place in the road, and then I know that he raised the rod until I struck the level. I was standing at the instrument 25 rods west of Lost Island lake. The instrument was a surveyor's transit with a level constructed for taking levels. Hemphill was standing with the leveling rod at number 1 and then he went with the leveling rod to number 3.

Q. Do you know how far this was in the earth, this pole that he was holding there at 3?

A. Number 3?

Q. Three, yes, sir.

A. I told him to set it at the water.

Q. Do you know how far it was in the ground when you took that level?

A. In the ground?

Q. In the mud?

A. No.

55 Q. Do you know how far it was in the mud, or sand or water when you took the level looking off toward Lost Island lake?

A. I took some precaution there that I might be able to answer that question on cross-examination——

Q. I will ask you to answer it by yes or no.

A. How?

Q. I will ask you to answer that question by yes or no?
A. What was the question, please?
Q. Read it, Mr. Reporter?

Previous question read, as follows:

Q. Do you know how far it was in the mud, or sand or water when you took the level looking off toward Lost Island lake?
A. I don't think it was in the water at all because I observed the rod before he set it down and observed it afterwards on purpose to see whether he had stuck it into the water or not, and it had not been wet.

My instrument was standing up; I could turn it around without taking it up and resetting it and did so; Hemphill was about 10 rods from me at number 3; there was a sheet of water at number 3. Number 5 is a little bit under the water; number 3 is at the edge of the water. It is not a sheet of water without any intervention of bog or anything of the kind, still it connects around to Mud lake. The seasons had been dry for two or three years before the time I made the survey in section 25 in Clay county. I had only seen Mud lake once before; that was several years before. I could not say how large a body of water it was, it seemed to be a small lake. The water level at 22 is 1.07 feet lower than at 1, and 1.62 feet lower at 1 than at number 3; 1.07 at number 22 that makes a difference of 8–100; less than an inch, and may be accounted for in the position of the staff.

56 Q. Do you know how deep the water was in this lake there, Mud lake and the swamp that you made observation from to obtain the level between the two?

A. Why, I know the depth of it in some places. The day we drove over there from the east side of section 30 we drove with a sled, the snow was soft and the sled settled down between the bogs in some places.

Along the north bank of Lost Island lake there is a line of trees bordering on the lake, the washing of the roots of these trees could be done by water that was drove up by high waves much above the level.

Photograph Exhibit "M" looks like a lake shore; I found a similar condition around the north line of Lost Island lake.

Defendant objects as not cross-examination, calling for a conclusion and not the best evidence.

Re-direct examination:

Q. Mr. Moore, from the fact that the level on number 3 and on number 22 came so nearly corresponding, would you say that there was the evidence of the correctness of your reading the other levels that you took?
A. Why, I thought so, and I think so.

Q. If there had been a raising or lowering of the leveling rod at the points where you took levels, would or would it not have affected the actual level of the water on number 3 and number 22?

A. It would.

Re-cross examination:

I read number 22 and 27 from the same place and assumed that the water level of Lost Island lake at 27 was the same as number 1. The instrument was somewhere between 24 and 25.

57 Q. Did you take a level at the point of number 27 on Lost Island lake?

A. I read that, yes, sir.

Q. Now, as I understand the mat-er then, you had your level somewhere between 25 and 24, and from that point you took a level at Lost Island lake?

A. Yes, sir.

Q. Mr. Hemphill handling the leveling rod at both points?

A. Yes, sir.

Q. Then I understand you had your instrument where?

A. Between 2 and 3.

Q. Between 2 and 3, and did Mr. Hemphill handle the rod and you take a level at number 3 and at number 1, number 1 being on Lost Island lake and number 3 being the water on the swamp land?

A. Yes, sir.

Q. And that the two levels so taken come within 8–100 of being the same?

A. Yes, sir; that is my figures.

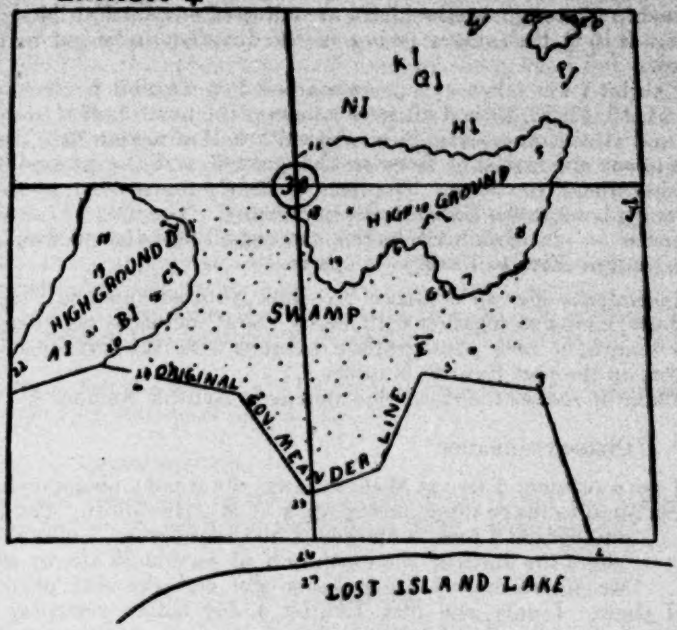
Q. Now, from that would you say that it would have been possible for there to have been any degree of changing of the thumb screw or whatever it was that indicated the lev-ling rod?

A. I think not, because I could have discovered it.

Defendant offers in evidence Exhibit 4, being the plat testified to by Surveyor Moore.

Objected to as incompetent, irrelevant and immaterial.

58 EXHIBIT 4.



J. W. WILCOX.

I am slightly acquainted with the south half of section 30, township 97, range 34. I know where the little house of Richard Ryan is situated. On the 30th and 31st of March, 1900, I took some photographic views of that land. The ground was covered with snow at that time. Mr. Moore, Mr. Hemphill and Mr. Ryan was with me at the time we took the levels. Exhibit 5 is a photograph of part of the land on the south half of section 30; it was taken at a point marked by the letter A on Exhibit No. 4; the camera was faced in the direction marked by the arrow close to the letter A.

Exhibit 6 is a photographic view of land in the south half of section 30, indicated on plat Exhibit 4 as letter B, with the camera facing north.

59 Exhibit 7 is a photograph of the land indicated on Exhibit 4 by the letter C.

Exhibit 8 is a photograph of the land indicated at a point marked D on Exhibit 4.

Exhibit 9 is a photograph of the land at a point marked on Exhibit 4 by the letter E, the camera facing northeast.

Exhibit 10 is a photograph of the land indicated in Exhibit 4 by the letter F, the camera facing as indicated by the arrow.

Exhibits 11 to 20 inclusive are photographic views of section 30, township 97, range 34, the places as indicated on plat Exhibit 4 by letters G to Q, the camera facing in the direction indicated by the arrow.

Exhibit 1 was taken at a point marked J on Exhibit 4. Exhibits 12, 14, 15, 17, 18, 19 and 20 were taken on the north half of section 30, and all the other exhibits on the south half of section 30. There was about six inches of snow on the ground and the ground was muddy under the snow. The land is clearly represented by these several photographs Exhibits One to Twenty. The letters I have referred to on plat Exhibit 4, have a corresponding letter on Exhibits One, and on Five to Twenty, inclusive.

Defendants offer in evidence Exhibits Number One and Five to Twenty, inclusive, together with letters A to P, inclusive, placed upon the margin of said photographic exhibits with the corresponding letters on the plat Exhibit Number 4.

Plaintiff makes the same objection as to Exhibit Number 4.

Cross-examination:

I am a printer; I live at Milford, Iowa; I am not a photographer; I was hired to make these photographs by Mr. Hemphill. The first photograph I took is marked A and number 5. I only know
60 where the lines of the south half of section 30 are by what Mr. Moore showed me and the plat and the blue print we had there. I only saw plat Exhibit 4 day before yesterday. I marked the plat Exhibit 4 the place I stood when these exhibits were taken. I marked them yesterday. I only know where the north half of section 30 is by that plat. I could not tell you where Exhibit 5 was taken without looking at the plat.

Q. Who assisted you in locating on this plat Exhibit 4 the places where you stood?

A. All the assistance I had Mr. Moore acquainted me with his different markings so I would know the different locations on the land; that was yesterday. There was nothing on the chart only the lay of the land as shown there. He simply give me the bearings of the chart. I took his word that the chart was a proof of the land and it is only from his statements that I could determine where we were.

The photographer at Ruthven developed these negatives; I simply took the snap shots and they were developed by him I made no memorandum as to where I stood when they were taken; just put the letters on the plat from memory.

P. M. MOORE, recalled.

Mr. Wilcox, the last witness, was out on the land handling a kodak the first day I was there. I recognize some of the photographs as being photographs of the land of section 30. There is a large tree that would make such a picture as Exhibit Number 5. Ex-

hibit Number 6 I remember there was a position of myself and others when he was taking the view somewhere at B, with the camera pointed in a northerly direction. I cannot identify Nos. 7 and 8. No. 9 has the appearance of the swamp there, but I did not observe the taking of the picture.

61 Nos. 10 and 11 I recognize objects that were in existence at that time which would make such pictures as these.

No. 12 looks like a picture of the ground as I looked at it on that day.

I see in photograph No. 13 fences and trees and raising ground that was in the place that would make such a picture.

No. 14 has the appearance of the grass in the picture that was on the ground at that place.

No. 15, I feel sure that is the picture of the scenery that exists between that position of L looking in the direction of the arrow.

I think the pictures I have referred to are pictures of the land as indicated by the letters on the plat.

Cross-examination:

I mean the views I signified as recognizing. I did not mean to testify that the views are correct except those I have designated.

J. T. PAINTER.

Age 55; reside at Spencer, Iowa; I have been engaged in civil engineering in Iowa for nine years; seven years as county surveyor of Clay county. I prepared plat Exhibit No. 21. The red lines indicate the Government survey of section lines and meander lines of sections 19, 20, 29 and 30, township 97, range 34; I have known the land since 1890. The meander lines as run by the Government survey is around what is platted as Lost Island lake; the north part is called Mud lake. The red lines represent the meander lines of the supposed north part of Lost Island lake; were drawn by me from the Government field notes and survey. I took levels around the meander line on the land and between the meander lines

62 as compared with the waters of Mud lake. I placed on plat Exhibit 21 numbers 1 to 12, inclusive, about the place I took the levels; these levels were taken August 6, 1897, the waters were higher at that time than it had been for two or three years.

Mr. A. C. PARKER: To save time I will concede that he found and will testify that the levels are as indicated on the plat. If it will save any time I will concede Mr. Painter will testify to the levels as taken, as shown on the plat, as shown by his figures, and that he will so testify and that the plat may be taken as his full testimony as to such levels at the different points indicated on the plat, and he may now, or some other time before the trial is con-

cluded indicate by proper markings or figures the places where he took the levels and what he found.

There was a point about the north corner of section 29, at that time the water was about knee deep. It had been dry the year before. Plat Exhibit 21 was made in 1890, and I think the water then was about the same as when I took the levels in 1897. The land represented in lot 8 on plat 21 could never have been covered by the waters of Lost Island or Mud lakes; it is too high. There is 138 acres in lot A, 160 acres in lot B, as represented by plat Exhibit 21; there is about 30 acres of lot B that is swamp land, the rest was all farm land and could never have been covered by the waters of Lost Island and Mud lakes; it was too high, except a small portion down to the southwest might have been covered in flood water. There is 160 acres in lot C, as represented by plat Exhibit 21, most of which is high dry land, the waters of Lost Island lake could never have covered the land represented by lot C; except it backed up into a little creek. There was a little ravine bottom, second bottom, and then it immediately goes into the high land. There is
72 acres in lot D of Exhibit 21; it is all high rolling prairie
63 except a little brook that runs through it, and there is a small
piece of wet land at the southeast and northwest. The waters of Lost Island or Mud lake could never have covered this land except it might have backed up and covered simply the creek bed. Lot E as represented by plat Exhibit 21 has 69 4–10 acres. Part of lot E is high, dry land, part of it was hay land and part of it was pasture land.

There is 83½ acres in lot F as represented by plat Exhibit 21, that was all dry land except a strip of wet land across the narrowest part about midway to the east which I call hay land. The land between lot F and the south meander line of Mud lake was wet in 1890, there was reeds growing on it but no water.

Cross-examination:

The round, red mark at the small A is the original Government corner of the northwest of section 30; I found a well established corner there; between that and the bank of Mud lake the ground is all wet. I should judge the corner is about two feet above the water.

Q. And what is there that represents the bank of Mud lake on this plat?

A. There is a blue line represents the edge of the high water, and there is a black line that I have surveyed for the edge of the farming land. Between the blue line and the black line the ground is wet and marshy.

There is not a very distinct bank along the north line of Mud lake except near the west part of section 30. I testified in the case of Grant *vs.* Eaton.

Q. And, on cross-examination, wer-n't you asked this question: Q. "What sort of a shore or bank or margin has this Mud lake on the north?" A. "The bank and shore is distinct all the way, except where this kind of wet place, where this slough would run into the lake in time of wet weather." Where is that slough that you referred to, and, didn't you so testify on that hearing?

A. This slough is up about 11 chains from the west line. There is a pretty good bank, then, for the next 14 and one-half chains there is wet land.

The wet land extends northwest to the Government corner. The bank is not distinct between the dry land and the water, but between the dry land and the wet land. It is apparent that during wet years land covered with reeds and rushes would be covered with water. The meander line on the east side of section 30 runs up over high land; it started near the wet land at the southeast corner, the first 17 or 18 chains, then it bears to the right over the wet land. The meander corner of sections 29 and 30 is out in the wet land or hay land. The corner is six chains east of the inlet or brook; it is on second bottom land. Lot F includes what is known as the island. I drew the straight black line east of the island for convenience. There was two different parties expecting to lay claims to these lots. About half of lot E is low pasture land, about three or four acres of it is quite wet and boggy. I think in the Grant *vs.* Eaton case I considered the high water mark as a foot and a half above the actual water level. I think it would be that much higher by the looks of the banks. If the water was a foot and a half higher it would cover a little neck between lot F and the timber point. It would carry the water down to the meander line. There is a well defined bank as represented on plat Exhibit G, at the arrow No. 5, my plat shows it by the black line. The well defined shore line or timber point is represented along there by the black line. It runs by the figures "16 chains and 43 links north of the southwest corner of section 30, it runs 9 chains then north 38 degrees, east 14 chains, north 16 degrees, east 2 chains, north 43 degrees, east 15 and 50 links, north 67 and a half east." Of this distance about one-third is good shore line and the other two-thirds runs across the wet land.

Re-direct examination:

The condition of the high embankment as indicated by the black line from the north half of section 30 is not a perpendicular bank, but ground that raises immediately above the wet ground and slopes up to the higher ground 15 or 20 feet.

Q. State whether or not there is any indication on that hill of its being a bank, or of the water having washed into it, or whether it is a continuation of the grass and sod from the low land up to the hill?

A. For the first 11 chains it is quite a bank there; for the next 14 chains and one-half there is no distinct difference of bank between, but for the rest of the distance it is a division between the low wet land and the high land, the dry farm land.

Q. And now what is the condition of the land along lot F, between that and the place indicated as water on the plat, as to being well defined bank, or a rise from the low lands to the hill?

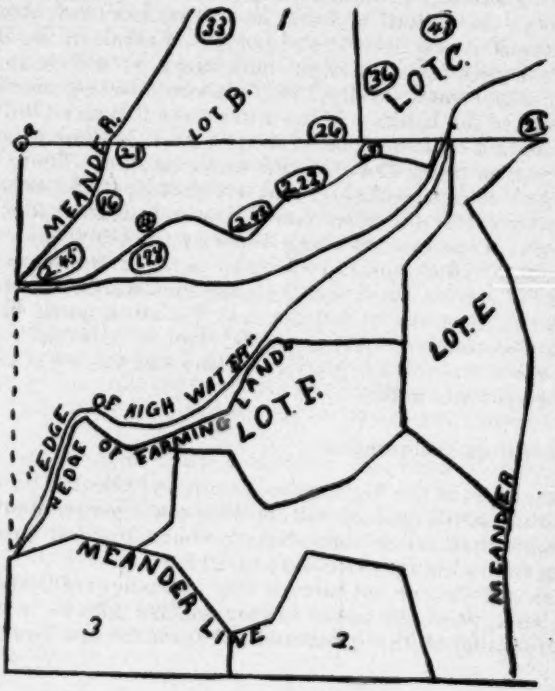
A. On the northwest part of lot F about 12 chains there is a kind of a bank there; the rest of the way I surveyed around and took in about so much of what is dry land, and continued then over and took in some of the hay land there. I didn't see any other banks there.

I took some levels along the black lines of the soil or swail. Plat Exhibit 21 correctly shows the survey I made of the land embraced within the meander lines of the original Government survey.

66 The defendant offers in evidence Exhibit No. 21, being the plat identified and testified to by Surveyor Painter.

Plaintiff objects to Exhibit 21 as incompetent and immaterial.

EXHIBIT 21.



E. B. EVANS: It is admitted that the defendant, Hemphill, has engaged in cutting timber on lot 14, and the defendant, Ryan, on lots 12 and 13 of the land in controversy.

W. L. HEMPHILL, called by plaintiff.

I am one of the defendants in this case; the injunction was served on me some time in January; after that I saw timber being
67 cut from part of the land in controversy claimed by Mr. Ryan. I was over there; I was not helping him haul timber, I was there when they was cutting; I did not assist in hauling it away. Mr. Valley was doing the cutting. I was going across to Miss Ryan's. At that time I had no money and property, only a homestead. I suppose I was insolvent. I got some of the money to buy this land from my father, and some of it from Barringer's bank.

Mr. E. B. EVANS: For the purposes of this case it is admitted that the defendants, Hemphill and Ryan, are insolvent.

W. L. HEMPHILL, called on behalf of defendants.

I live on section 20, township 97, range 34 Palo Alto county, Iowa. Have lived there most of the time since 1890. I have lived on what is known up there as the unsurveyed land. I live about where I have put the letters, W. L. H., on Exhibit 21; lived there until a year ago last fall, when I moved east about 80 rods down on section 20, about where I have put the initials "W. L. H." on plat Exhibit 21; have lived on that land all the time since I moved on except from November, 1890, to September, 1892. I have marked on Exhibit F, with a little ink cross as nearly as I can, the two places where I have lived. I am acquainted with lots 2 and 3, where Mr. Schlosser lives. The unsurveyed land of section 19 is rolling prairie land, or was at one time; it is cultivated land now; there is a little creek on it runs down across section 20, across the southeast corner of section 19. There is no lake on it, never was. The land on section 30 is part high land and part of it is marshy, wet land. The north part of section 30 is grass land or swamp land. It can be pastured and mowed; that has been its condition for 10 years that I have known it. The land between the black line and the north line of section 30 is high, dry land. Can all be cultivated except
68 a little on the southeast corner of section 19, it is practically all under cultivation. Some of it has been under cultivation for 15 or 18 years.

The land between the two blue lines on Exhibit 21 is wet land. It varies; I have seen part of it plowed up, that part down at the west side of what is known as Mud lake. I have seen a part of what is known as Mud lake in section 30, in cultivation; it would be lot 7 and 8, or the south half of the northwest quarter.

M. L. PARR.

I live in Ruthven; have lived around there for 22 years. I know section 30, township 97, range 34; have known it for 22 years; been around it a good deal, drove around it; I am acquainted with what is known as the island in section 30. The land between Schlosser's house and the island is kind of low, kind of grass growing on it when I was there a year ago and I have been there before and it was about the same. It was about 20 years ago that I was north of Schlosser's house, the ground was low and wet, there was reeds and grass and canes growing there, I have been there frequently during the 22 years; drove hunters around there. Grass has been growing on there for the last 4 or 5 years. Mud lake is north of the island. I can't say exactly whether Mud lake comes south of the island. I have known Mud lake to be quite dry in the last 6 or 7 years. The road near the county line in Clay county was graded up several years ago just west of the lake; it obstructs the flow of water through there; I think it has been within the last 12 years that it was graded up.

69 Cross-examination:

Ruthven is about two miles from Elbo lake, no, Elbo lake is about 80 rods from Ruthven; I thought you meant Lost Island lake; Elbo lake is just south of Ruthven.

Q. When you came there in 1878, what kind of a lake was that right south of Ruthven?

Objected to as not cross-examination and immaterial.

A. It was a pretty deep lake, not very large, about six feet of water in the deepest places. There was no weeds in the center for a number of years and the last few years it has practically dried up.

Q. Before that time it was considered a well defined lake?

A. Oh, no; not considered that; there was a lake there, what was called a lake, but there was not very much water in it.

All the lakes up north there, Lost Island lake and all the other lakes were higher 20 years ago than in later years; Lost Island was 3 or — feet higher, Mud lake correspondingly high.

Q. Do you remember, Mr. Parr, of driving Mr. Schlosser and Mr. Kirkpatrick and myself out around Mr. Schlosser's farm last January?

A. Yes, sir.

I remember water coming in at that time along the west line of the timber point from the north side and around to the east side. There was a little water around there, not very much; in driving up we had to drive on the dry land going to Schlosser's house.

Q. Now, isn't it true, Mr. Parr, to call to your memory, isn't it

true all this land north of Mr. Schlosser's and between
70 that and the island in there in an early day was covered with water the greater part of the time?

A. Not a greater part of the time.

Q. You have frequently seen it covered with water?

A. I have seen water there.

In early years the postoffice was at Mr. Anthony's. I used to be over there. I paid attention to the land north of there and how it was covered with water and where the water line began.

Q. Have you seen this portion north of the house covered with water?

A. Not very much; very little.

I have seen quite a body of water in Mud lake; it extended north of Schlos-er's and east; the body of water was large in the early years. It began to recede and dry up in the last 6 or 8 years.

S. BANFILL.

I am 52 years old; I came to the country north of Ruthven in the spring of 1871. I lived there about 7 or 8 years, then lived in Des Moines a few years, and for the last 10 or 12 years have lived up here again. In 1879 I had a farm on section 24, in Lake township, Clay county. Section 24 is just west of section 19, township 97, range 34. My farm was on the northeast quarter; the south half of the northeast quarter. I lived there for 7 or 8 years from 1871. Am familiar with the land around Mud lake, been around there a good deal; have been across section 30, township 97, range 34 a large number of times. I bought wood of Mr. Anthony on that woodland there, and used to go across and chop and haul wood. After I had been here two years there was a postoffice at Mr Anthony's, and I would go there to get my mail. I went across the east part of section 30 to get it.

71 Some of the time I went right across; sometimes I went around on the east part. I am familiar with that part of the land designated on Exhibit 2 as marshy pond called Mud lake. In the fall of 1871 it was nearly dry; the west part in Clay county was about all where you could see any water. You could not see any water in Palo Alto county. The dotted line on Exhibit 2 correctly shows the boundaries of what is called Mud lake proper as near as I can tell; I am acquainted with the so-called island north of Schlosser's house; I think the land between Schlosser's house and the island is swampy. I don't think there is any part of Mud lake south of the island. There is a kind of extension of the lake, a pond, a small place south of the island, I never called it a part of the lake, I just called it a pond or slough; it might have been connected with the lake. The postoffice was kept by Anthony from 1872 or 1873 to about 1879. It could not have been so very far from Schlosser's house where I would go across to get my mail; I most always went

horseback. Part of the time I went cat-a-corner across. Don't think I went through there much in the summer; only in the fall. I think I must have crossed this inlet near where Hemphill's house is. We got our timber off the island in the winter time. The lake was higher some years than others. It was nearer dry in 1871 than I have ever seen it in the last 7 or 8 years. After 1871, there were several years that the marshes got dried out so that you could go over them, that was between 1871 and 1879.

Q. Now, which marshes do you refer to; any on this section?

A. Well, you could cross from the old Anthony place over on to that island where the timber was; I went over there one time; I noticed there was some one had been planting corn there on
72 the island; I didn't have any idea from the way it looked years before they could cross there in the summer, but I saw some one had been planting corn there on the island.

It might have been 1880 or 1881 when the corn was planted on the island. I didn't notice how they got over there to plant their corn; I saw it was planted with a planter. During those years the land between the island and Anthony's house had been pastured several years. I don't know just what year I noticed the cattle there first. There was hay cut on the bottom and east of Anthony's, kind of between Anthony's and the island. I could not say surely what years, but it was during the time Anthony was running the post-office before 1879. During the years I was living there there was grass growing between Anthony's house and the island right along, but in the wettest times it was covered with water; I mean after a heavy rain, some summers we would have heavy rains, several of them, so the roads would be nearly impassable to travel. Such times as that there would be lots of water in there; in ordinary seasons the grass would grow on the low land between the island and Anthony's house. There was one place, a kind of pond, and the grass did not grow much there, the pond covered 2 or 3 acres. The pond was just about north of Schlosser's house. I would not call it a lake, just a pond; the other land in there north of Schlosser's house and up to the island I would not call a lake. There was a great deal of grass and reeds growing up in the lake in the summer of 1871, you could not see so much grass for a year or two after that.

Cross-examination:

I lived on my farm 7 or 8 years, then in Ruthven about 3 years, then in Des Moines 3 years, then lived in Ayrshire about 3 years and then went back to Ruthven; I have lived
73 there ever since. Mr. Anthony lived on his land after I left my farm and moved to Ruthven; I have never been out to the land since I came back to Ruthven in 1893, and have not been on the place since I left, in fact. I remember the timber point as designated on plat Exhibit G, and where the island is, and I re-

member the depression as indicated on the line between A and A; it is quite a large depression. Around in front of Anthony's house is quite a well defined bank or abrupt raise on which there is timber growing; plat Exhibit G looks as if it might be as I remember it, and I remember up northwest of the house there was quite a little raise there on which there was trees growing. From that point over to the lake north of the point is what I would call swamp land and off to the east for quite a number of rods continuing up to the section line, as I seen it, is a large flat east there. When I went after my mail on horseback I went around east of that flat land and struck the Palo Alto county road, but when I walked I came up by the island, came up through the flat east across the end of the island. I have not seen the flat east of the house on this low land covered with water very often. I have seen it, but not the first year. I think the lake was higher from 1872 to 1873 up to the time I left there than it has been since. I don't remember cutting across there on horseback except when it was froze; I didn't know whether I could or not; I didn't like to try. I don't think I could go across there on foot when it was extremely wet without getting in the water. My mother walked across there one day, it was quite wet and she got her feet wet; think I could have crossed there the same time and probably not got wet. I went horseback and the other way the most. When I had to go around I rode.

Q. Why didn't you cut straight across to where his place was at those times?

74 A. Because there was a creek there; I didn't care to wade through it.

Q. Was there a creek there or was it the lake?

A. If you would go direct, straight from my place to Anthony's, I think you would strike the end of the lake, but there was a creek there that made me go around quite a piece further than I would if the creek had not been there; the creek was the inlet to the lake.

It looked to me like it was about the middle of the section, of section 30, the distance seemed to me as though it was about that. Aside from the creek you could cross. I don't know as I could designate on plat Exhibit 2 where the creek emptied in Mud lake; the bed of the lake came around the timber point and close to the island.

Q. Now, I understood you to say that you saw where they had been planting and raising corn on this island at one time after you came there, and after 1871; is that right?

A. Yes, sir; I went over onto the island one day, and I saw some one had been planting corn there; I don't know who done it.

Q. How did you get onto the island?

A. I went across from the old Anthony place to the island.

I walked across to the island; was surprised that they had planted corn there. I supposed the land was Government land, and I wondered who had put it in. I bought timber there of Mr. Anthony,

and then I knew a short time afterward that he did not own it. I had bought the timber and taken it away before I felt sure that he did not own it. I did not notice whether there was a well traveled road across there or not. I don't know that I ever knew of a team ever driving across there; there might have been fifty and I not known it. A person could step over the creek where I crossed
75 it; as it got down nearer the lake it got wider. I had to go to nearly the extreme northeast corner to cross it. I could not cross it below down by the lake; there seemed to be a running stream there. The creek dried up except for the springs in the dry time. I could get over it lots of times with a wagon without getting the wheels wet. Some of the time there was water there and some there was not. In an ordinary high stage of water there was water there.

Q. In ordinary years haven't you seen that stream running, and isn't it a stream that drains the country away up from Twelve Mile lake down into this lake, that is what I am asking you?

A. The answer is that some of the time there was water there and some of the time there was not.

Q. Was water there the ordinary seasons of the year, the ordinary high stage of water in the lake, was the stream running?

A. Yes, sir; in an ordinary high stage of water there was water there.

Q. That is what I am trying to get at?

A. Yes, sir.

Q. And, in an ordinary high state of the water in that lake there was a large sheet of water there that run clear up on section 30, up near to the island, and extended clear over to the land in Clay county, isn't that true? The ordinary high state of the water during the first years you were there, isn't that true?

Mr. E. B. Evans: Objected to as not being a competent question; there is no such thing known as ordinary high.

A. I don't think that that is right.

Q. Well, what is the fact? What ain't right, my question?
76 A. No, your answer to it. You answered your own question, and I don't think you answered it right.

Q. Well, you answer it.

A. You will have to explain to me what the ordinary high stage of the water is in order to answer that correctly.

The lake covers a half section of land probably. It extends nearly to the island. I would not call anything a continuous sheet of water where there was just a little bit of water among the grass and rushes. Rushes grow in boggy land and where there is a sheet of water covering the surface.

Re-direct examination:

I crossed the creek quite a little south of the north line of section 30, from there down it gradually widens out into the lake. The water goes from there into Trumbull lake. Trumbull lake got very low in 1871, but not anywhere near dry. The raise and fall of water in Trumbull lake would not necessarily affect the water in Mud lake; Mud lake is higher. In the spring of the year after the snow melted the creek had water in it. In dry seasons in the summer it dried up so that cattle would not get water; the average summers the water dried up in the creek. If there was a ditch dug from Mud lake to Trumbull lake it would drain all the water out of Mud lake. The distance between the two is about a half mile, and a ditch between the two would have drained Mud lake during the years I was there. There was a large body of land up there known as the unsurveyed land.

Re-cross examination:

Q. Now, how do you know this ditch would drain Mud lake? Did you ever strike any level between the bottom of Mud lake and Trumbull lake?

77 A. Well, sir, when I lived up in that country I was not entirely asleep. I had a notion of draining that lake at one time, to get it dry and enter it, but I made up my mind, after I took a thorough examination of it, I made up my mind that it would be so much trouble in ever getting a title to it that it would not be worth while, so I gave up the project.

Q. Now, just answer the question?

Read the question, Mr. Reporter.

Previous question read as follows:

Q. Now, how do you know this ditch would drain Mud lake? Did you ever strike any level between the bottom of Mud lake and Trumbull lake?

A. Well, sir, I can't say that I have, not to get the exact level, but I figured it out close enough so I knew about what it was; it was, as near as I could make it, it was about five feet.

Q. What is five feet?

A. Mud lake above Trumbull lake.

Q. The bottom of Mud lake?

A. No, sir; the surface of the water of Mud lake when the lake was full, and the surface of the water of Trumbull lake.

I went along and noticed where each fall in the creek was; the creek didn't flow steadily; there would be a place that would be level and then there would be a little fall, and I measured the fall with my eye. This creek between Trumbull and Mud lakes is about a half a mile long. I don't know how large the first fall was nor how many falls there were, nor I can't tell how many inches the second fall was. I presume the opening into this creek was about

a foot deep at that time. The bottom of the ditch was on a level with the bottom of Mud lake; Mud lake was shallow at the shore, but if you went out a little ways there would be three or four
78 feet of water. I put a pole down in lots of places to see how deep the water was and measure it with my eye. It was just a little natural ditch, there was running water from one lake to the other, when I saw it, just a little stream about as large as a man's arm. I should judge Trumbull lake in some places was 7 or 8 feet deep, quite a large body of water.

FRANK GRANDY.

I live at Ruthven; am in the railroad business; lived there ten years. Know where George Schlos-er lives, have known him 6 or 8 years. I was on the land yesterday morning with Mr. Grift, Mr. Valley, and another gentleman, Davis, I think. We had a plat there similar to Exhibit 2; there was some water on the lots designated as 12 and 13 on plat Exhibit 2 and at Mr. Schlos-er's house; there was weeds and rushes all over the land there between the island and point, did not run east to Lost Island lake. I cannot point exactly where we drove with our team; we passed Schlosser's house, passed his grove, then turned in between the two islands, we did not drive over there, we were going to, but only drove to the edge; we then drove west to Mud lake, up to the point of the Clay county line; there was no water between the west point of timber and the road we drove out on and came to the main road south. We did not go over to the island.

COURT: Why didn't you go over to the island?

A. I don't know.

We were going over there, but it was rough and there was a little water there and I was afraid the horses would get down. I told him he had better not drive through there; there was a little water and bogs there.

79 Cross-examination:

There is two timber islands there, one opposite his house, one further west; the one west is a point, it is not an island. I don't know much about it, only what I saw yesterday. We were on the south side of the timber point. There are several groves, one north of his house, one on the point, and one on the island, and one east of the house; we were at the grove west of the house. We went over to the point toward Mud lake, then we went straight south and came home. I only knew what they told me about the premises. We were on lots 12 and 13 both. They told me it was lots 12 and 13. Mr. Valley had the blue print. I did not know whether it was section 30 or 40; took Valley's word for it.

J. T. PAINTER, recalled.

Cross-examination:

I have completed plat 21, and the red round marks represent the levels that I found at different points. I took no levels in running this line from the meander line on the west side of south half of 30, nor in running the black line across southeast from the timber point, and then running northeast from the south end running over to the island. If the water was a foot higher in Mud lake than it was when I run that line, I think it would extend down to the bank north of Schlosser's house. It would run through between the island and the timber point. I did not survey the blue line up north except taking the measure across it. It was 2 chains across it. I drew the black line as far as the lake shore, and took that point and marked the south line on the inside of it, to show where the lake was, where the blue line leaves the black line was
80 drawn by estimation, and the blue line south of the black line on section 19 was drawn next to the black line for 11 chains, then it was drawn by estimation.

Q. Is there not high dry land here west of the blue line, between the island and the timber point. Quite a stretch there of several rods of practically flat land before you strike an elevation of dry land.

A. Yes, sir; there is. This black land follows along, and between the dry land and wet line that I surveyed, the land on each side of the narrow strip surrounded by blue. There is low land until you get out here to the island, low, marshy ground, and it runs clear around the island, some wetter than the other. I drew the blue patch east of Schlosser's house by estimation. That was wetter ground in there; it is more boggy and bunchy, more reeds than that lying east of it out to the meander line. I don't know how it was in 1857 when the survey was made, except the island and the point it might all have been covered by one continuous body so far as I know.

Q. I say it might for anything that you saw there, taking the level of these different points that might have all been covered by water except the island and timber point.

A. It could not have been in 1855, because 1855 was an exceedingly dry year.

The township range was surveyed in 1855, the subdivisions in 1857. 1857 was a more wet year, and it might have covered a large portion of it. My object in making these levels was to ascertain whether section 19 was surveyed or unsurveyed land. I subdivided section 30 in 1890, late in the fall. It was rather dry. There were hunters all around there shooting. There is no well-formed sod, and it is boggy from the point where I crossed the black line from the island to the timber point. Section 19 is too long north and south,
81 and too short on the west part. The west line on section 29 I think is a little too long. The red section lines are my sur-

vey, but the meander line is intended to represent the Government survey as near as I can retrace it. I can give them the full amount by retracing it, but if I would put that point that should be on the line farther east on the line, it would cut their land a little short. I do not find a corner at the northeast corner of 30. It is wet land there; not fit for a corner. I mean that it is land that the Government surveyor does not make a permanent mound on, and I did not examine for a corner at all. The Government field notes call for a witness corner at that point. The field notes would put it about the same as I put it there. I think about three-fourths of lot E is land they would not put a permanent monument on.

Re-direct examination:

The blue line shows the channel of the inlet or outlet correctly where I measured, and as nearly correct as I could draw it by sketching while I was on the ground. I took notes about how far it looked to me. At certain points it looked like the water or pond, and I drew it, and where I measured it I put the measure down. The black lines were run according to measurement. It was only the blue lines I estimated. I surveyed west of what is known as Mud lake, for a road in 1884. For 15 or 20 rods wide there is a strip of wet land with a kind of a channel where the water runs west. There has been a road graded there since I surveyed it, and a little bridge over the channel from the outlet.

Q. What effect does that grading there have upon the west of what is known as Mud lake?

A. During the high water it could not flow off as quick; during medium water it would not have any effect.

82 Re-cross examination:

The bridge is probably twelve or sixteen feet long. There was kind of a double channel there when we surveyed it, and we put it all into one. I was in the southern part of the State in 1857. Came to Iowa in 1855. In 1857 there was a very heavy snow, extremely heavy. That was the spring of the Spirit Lake massacre; the last of the snow did not go off until April.

Re-direct examination:

Inside the red lines give Mr. Schlosser the full amount of acres in lots 2 and 3, as shown by the patent from the Government.

Objected to as irrelevant and immaterial.

Q. I will ask you if at the time the township and range line was run in 1855 between 34 and 35, was it run through what is known as Mud lake?

A. According to the field notes it was measured through; they did not offset as they did at Lost island.

I have examined plat Exhibit 2 and I think it correctly represents the land within the meander line of what is known as Lost Island lake. The dotted line on plat number 2 designated as "actual margin" correctly represents the body of water known as Mud lake in its ordinary stages in sections 25 and 36. It was drawn a little wider north of the island on section 30. Then I drew it, but is probably more correct than I drew it myself.

Re-cross examination:

I saw the stages of the water of Mud lake in 1884, on the west. I was never over on the east line until 1890, when I was sur-
83 veying there. I saw it in 1897. Have not seen it except when I was surveying it. I could not say that those were the ordinary stages of water any more than what I seen the appearance of high water on the bank, little drift sticks and appearance a little back. I did not survey the meander line around lots 2 and 3. I surveyed part way; began at the southwest corner of 30, surveyed north to the lake, then followed the meander line. The red meander line is drawn by the Government field notes. I did not survey it on the ground. The field notes do not mention any quarter corner on the northwest line of section 30. It does all the other lands.

Q. You do not understand from that survey that there was not a lake there when they were surveying that, do you?

A. Yes, sir. North, between sections 25 and 30, 16 chains, 43 links, set meander post on south side of lake; lake bears northeast and southwest." I am reading from the Government field notes. "Made mound of earth and sod, pit 8 links south, 59 chains, 31 links; set meander post on north side of lake; made mound of earth and sod, pit 8 links north of post, 80 chains, set post corner to sections 19, 24, 25 and 30; made mound of earth and sod, pit 8 links south of post, corner, in swamp; swamp from corner bears east and west. That is pretty correct as I found the land there afterwards about Lost Island lake, starting in at the southwest corner of section 31 running north between 31 and 36, is in the lake. I will read how that started. "60 chains, 25 links, set post on north side of lake and then it goes across the witness post; lake bears southwest and northeast; 80 chains, set corner post to sections 25, 30, 31 and 36; got the distance from township corner in lake, beginning at quarter corner of township line west of lake, north 60 chains, 25 links, thence east 40 chains to true corner."

84 Q. Now, in surveying across the other land, they don't tell how they got the distance, and that is the reason you guess they waded across there?

A. Yes, sir.

Re-direct examination:

East, corrected between sections 30 and 31, 37 chains, 40 links, scattering timber, bears north and south, 34 chains and 92 links, set a quarter section post; there is description of bearing trees, 45 chains, leave timber, bears north and south, 64 chains and 42 links, lake, marshy, set a meander post in mound of turf, pit east 8 links; 74 chains 92 links, section corner, surface level, soil 3rd rate, timber oak.

Plaintiff offers in evidence record of field notes.

Field notes, pages 212 & 213.

West random between sections 30 and 31 var. E 10 53.

Chains.

74.92 Length of line between sections 30 and 31.
E corrected between sections 30 and 31, var. E 10 44 grees and 44 seconds.
37.40 Scattering timber bears N. & S.
34.92 Set a quarter section post.
Bearings: Burr O. 10 S. 63 W. 36
D. 10 N. 53 W. 46
45.00 Leave timber bears N. & S.
64.42 Lake marsh. Set a meander post in mound of turf, pit east 8 links.
74.92 Section corner.
Surface level soil, 3d rate, timber oak.

85

North between sections 39 and 30 from meander post between sections 29 and 32, variation east 12.
Offset north 15 chains, thence east 6 chains, thence north 25.00 chains, thence west at (right angles) 5.40 links and intersect lake and marsh bearing north and south.
40.00 Set a quarter section post in mound pit east 8 links and east of true quarter corner, 10 chains and 30 links, thence north from witness ¼ S. corner, 30 chs., thence 10 chs. and 30 lks. west to marsh.
70.00 Set meander post as witness to true section corner, made mound of turf and pit east, corner to sections 19, 20, 29 and 30 (and 10 chains south of true corner in marsh).
75.07 Length of line between sections 19 and 30.
East corrected from section corner post on range line between sections 19 and 30, var. E. 10 53.
13.63 Intersected marsh. Set a meander post in mound pit east 8 links.

Page 368.

North between sections 25 and 30, var. 11 degrees, 45 seconds E.

16.43 Set meander post in south side of lake.
Lake bears N. E. and S. W., made mound of earth and sod pit 8 links south.

59.31 Set meander post on north side of lake, made mound of earth and sod pit 8 links N. of post.

80.00 Set post corner to sections 19, 24, 25 and 30, mads mound of earth and set pit 8 links south of post, corner in swamp.
Swamp from corner bears E. and W.
Prairie level, soil 1st rate, growth grass and weeds.

86 EDWARD BEATTY.

Live in Lost Island township, Palo Alto county, section 19. I am acquainted with Exhibit Number 2, and the land embraces in it. I have had in cultivation lot 8 of section 30, township 97, range 34. It was in 1895. I sowed it to flax about the last of May I think it was. I have known the land since 1890. Lot 11 has had some water on in the spring, in extremely wet times. I cannot say whether there was ever any water on 15 or not. The land- in lots 11 and 15 are practically dry in the fall except spots. It has been pastured every year, practically, since 1890. I think a greater part of lot 14 has been covered with water part of the time. I have not known it all to be dry. There is a spring there; the east half of lot 14 is high rolling land, timber growing on part of it. The east half has not been covered with water since I have known it. The east and south part of lots 12 and 13 at high stages of water would be overrun. The water has receded from that portion of lots 12 and 14 during the years I have known it, and it has been pastured. If there is 52 and 16–100 acres in lot 12, I should think there was 10 or 15 acres that had been covered with water, and that only in exceedingly high water. If there is 49 and 25–100 acres in lot 13, I should say that during stages of high water 15 acres had been overflowed.

Cross-examination:

I was not there when these lots were surveyed. I only know where the lot line is from the plat. I don't know as I could find the lot line exactly without measurement. I think lot 15 could be mowed. Have seen it pastured by Mr. Schlosser different years along since 1890. He has pastured it, and cattle have grazed
87 there and run over it all times of the year. Have seen water stand on lot 11. Lot 12 is part timber and high land; balance is marshy land. I understood there was 52 acres in 12. The north line of lot 12 is timber, high land. The timber lines

run across probably 60 or 70 rods, clear across the whole lot. The timber point there is probably between 40 and 60 rods. It is all low around the island; except the island and the timber point all the land on section 30 is a kind of a second bottom land. The bank of the lake on the north is a well defined bank part of the distance. I have seen water up there in the spring of the year. I had my flax on lot 8 and part or lot 7; had in about 50 acres. There was no sod there. I called it the bottom of a marsh. It produced very little flax. I did not harvest it; it did not mature in the fall and the weeds took it. No water got on it. It would not have been worth cutting. I think probably it was wet the next spring. It was the only spring I would have undertaken to have cultivated that land. There was some water in the lake bed this spring. I lived in Ruthven from 1883 to 1888. There was a large lake near Ruthven—Elbow lake. I do not think Elbow lake was 8 or 10 feet deep. I do not think there was any places over 5 or 6 feet, possibly 5 feet. Quite a little sheet of water. There was rushes, grass and stuff in there, around the edges, and in parts of the center. It dried up one year. In 1892 and 1893 I crossed there a great many times. There was a bridge across it on the Rock Island road. I testified in the case of Grant against Eaton, that the north shore of Mud lake had a well defined bank part of the way. Some places it was 16 or 17 feet deep, and then there was a second bottom like. There was an inlet there; quite a volume of water came in from the surrounding country. I was one of the defendants in the case.

88 Am interested in the land above there, and have been interested in these surveys. Was interested in the land in section 19. Right back of Schlosser's house it was quite wet last year; water there in the early part of the season. Quite wet for 30 or 60 days and then it dried out in the fall so that cattle could run on it and graze on it.

Re-direct examination:

Since I have known the land on section 30, it has all been practically of the same character, as to being low marshy ground. It growed up at times with heavy weeds and grass. The weeds growed in the middle of section 30, probably 7 feet tall in the lake bed proper, as they call it. I went clear through them. I had a lot of cattle there. Just outside of 30 on the Clay County side they were very high. The cattle did not eat them down. I had 150 head of steers in there. They ate the flax and weeds and grass that was in the lake, and all around that marsh.

Q. Now, the bank that you have testified to on the north side of what is known as Mud lake, state whether or not those were the banks of a lake or of a hill rising up from the low land?

A. That was a hill rather, rising up from the second bottom land; it was land that of course overflowed at high water times on the north side, but went back quick.

E. D. O'NEIL.

I am a farm hand and acquainted with the land in section 30, township 97, range 34. Have known it since 1895. Was acquainted with it in 1898 when the Government surveyor was out there. I built a shanty on the south half of section 30 that year. I built it in May. I know where the house that Richard Ryan lives in is situated. That is the house I built. I sold it to Richard
89 Ryan. I hauled the lumber on the hill where the shanty was built. We hauled the lumber there with a team and wagon from Alex Hemphill's. We went straight across to the island; crossed lots number 4 and 9. I went across there during that summer about three times a week. The lots were not wet when I crossed it. The land was dry between the place I built my shanty and Schlosser's house, immediately south of it. Ever since I have known it it has been that way. Sometimes it was wet in the spring. That has been the condition of the lots on section 30 since I have known it.

Cross-examination:

I built the shanty for myself. It was not my brother that put the shanty on there. I came out here in the spring of 1896. I went over on the north half of section 30 from Hemphill's to the island. I have drove my team between the island and Schlosser's place. I did not have a load on. It was in the spring of the year 1896. Mr. Hemphill married my second cousin. I have been interested in getting some of this land opened for survey. We hauled the lumber at one load; crossed over there with the team and wagon 5 or 6 times, in the month of May, 1898. I have seen it so I could not get through there with loads and the team and wagon, from the island to the house. I went back up there quite frequently. Sometimes there was a sheet of water in there. I lived in the shanty from May until August, 1898. I then went to Humboldt county. Have not been back there since. I got the lumber in Ruthven; my brother bought it. I paid for it. I remember of Schlosser having a suit against Mike O'Niel. I do not know whether the notice was served before I made the application for survey or not.

90 Re-direct examination:

I made a contract with E. B. Evans to secure the land for me, and it was after I made the contract that I built the shanty. Mike O'Neil had no interest in the shanty at any time.

Richard T. Ryan.

Twenty-five years old; live on lots 12 and 13, section 30, township 97, range 34. My house is situated on lot 12. The house was built in April, 1898, the year that the Government surveyor was there surveying. It was built by Ed. O'Neil. I purchased it from him on August 5, 1898. I moved in the house on August 8, 1898. I had been teaching school before this time. Have been working at farming since. Have worked for Mr. Lee Hemphill some of the time. He is my brother-in-law. I have done most all kinds of farm work that can be done by riding. I have about 7 or 8 acres of my homestead under cultivation. When I worked for Hemphill I would sleep in my house and go to his house in the morning. Sometimes I would stay at his place all night. I drove from my house to his house most of the time. I am crippled and have to use a crutch to get around. I drove across with a horse and buggy. In coming from his house to my own I would drive over lots 4 and 9 and lot 12. Sometimes I would come from the south across lots 12 and 13; and sometimes I would drive in from the east across lots 11 and 14 in section 29. When I went from my house to Ruthven I would usually go out over west lots 12 and 13, and then south down the section line. The south half of lots 12 and 13 has been dry most of the time. In the spring of 1889 the water backed up there and stayed for 30 days on part of it. It was dry the biggest part of the remainder of the season. There has been a lot of water there this spring.
91 There was no water prior to the time the snow fell, and had been none during the winter and fall. The north part of lots 12 and 13 are dry except a little bit of 13. There is a little bit of a pond there. There is 52-15 acres in lot 12. About 35 acres is dry land at all times. The rest is swamp land; low, covered with grass. There is 49-35 acres in lot 13. About 32 acres of lot 13 is dry at all times. The balance is low and covered with grass. I have pastured the remainder of the land except the 8 acres under cultivation. I took in cattle and rented my pasture. Lots 11 and 15 on the south half of section 30 is mostly swamp land covered with grass and sod. They have been pastured during both seasons that I have known it. I never knew the land prior to the time I moved on it. The greater part of lots 4, 7, 8, 9 and 10 on section 30 is about the same as lot 11, with the exception that there is a creek running through them. Robert Beatty has a homestead on lot 5, section 30. William Beatty took lot 6 on section 30 as a homestead. My sister has driven across the land with me usually. Her name is Bela Ryan. She lives on lot 7 in Clay county. Has a homestead on there. She has been working for my brother-in-law, Hemphill, and living on her homestead; would go back and forth with me. I am an unmarried man and live alone.

Cross-examination:

I have been working for Hemphill part of the time since the spring of 1898 helping him farm. Hemphill's house is on section 20. I do not know just what lot on section 20. I went on my land in August, 1898, after the Barber survey; about three months after, I think. At the time of the Barber survey I was living on lot 14 in section 29; lived there about three months. I came to the conclusion that lot 14 would not turn out dry land. I measured
92 it in July after the survey. I made no entry of lot 14 on 29. I think I made my entry in September on lots 12 and 13, but don't remember just the date. It was the day the land opened up. There was a building on lot 12 when I went there. It was a shanty belonging to Ed O'Neil. He had been on there about three months. The shanty was 8 x 12. I bought out his claim on lot 12; paid him $25.00 and took his right of entry and took the house. There is one door in the house and two windows. The house is shiplapped and sided; shingled roof. It is not plastered. I put on an addition 6 x 12 in December, 1898. It was a shanty I found there on my lot, lot 13. I don't know how long it had been there; I don't know who put it there. I took it away because I didn't want it there. I had good reason to believe it belonged to Schlosser, and I went and got it and attached it to my own. I told him to take it off if it was his. He said he would take it off when he got ready. I went and took it. I told him I would take it off if he did not. I didn't ask his consent. I appropriated it to my own use. I think it was perfectly honorable and legitimate to do that when he would not take it off. I use it for a barn to keep my horse in. I plowed the 7 or 8 acres at different times, breaking some in 1898 and some in 1899. I think I broke about 7 acres in 1898. In 1899 I plowed for corn there and broke about an acre more. I planted garden on part of it, and grass seed and timothy; about 3 acres to potatoes, and every kind of garden truck. My pasture is run right in with Mr. Hemphill's pasture. The fence is on the south line of the island. I built part of it; got the material in Ruthven; bought it myself. Hemphill and I bought at the same time. Mr. Hemphill took the cattle and I looked after the fence. Some of them were here all year. Some took their cattle out. There was one man's cattle died the day he brought
93 them in there. Two of them died the next day. I think it was because the drive was too hard. I could not say how many head were taken away during the summer. Right in the spring the land would not produce enough to maintain the cattle. The island was completely surrounded with water that spring for a little while, probably a week or two. I think it was in May. I was in my shanty during that time. Drove out and in with my buggy. Drove the route I usually did to go to Mr. Hemphill's. Passed over there three or four times while the island was surrounded with water. It was very near up to the hub for a few days

east of the island; covered all of lot 11 except about 10 acres along the west side; covered part of lot 15 and part of lots 9 and 10. There is a portion of the island in lot 9. I think it covered about all of lot 8. I crossed over lot 13 during that time. That was in the spring of 1899. There is a little water on lots 8 and 9 now. When I go from my house to Hemphill's I cross over the water. There is probably two or three inches at the lower part. There is a little run there that there is probably 6 or 8 inches of water in. I cross the inlet at the bridge. I usually go out straight when crossing lot 9 to that little island on lot 9, then straight up to Hemphill's house. I might strike the corner of lot 10. I go across the west part of lot 9 because it is the shortest way. There is a gate in the fence down there, and I go for the gate.

Re-direct examination:

During the two weeks of high water when I crossed over lot 13 I came in from the south. There was no water between Schlosser's land and the timber point on lots 13 and 14. I came across on lot 13, or the hill on lot 12 down across the little ravine, and followed the fence and meander line around. During the high water
94 period in coming from lot 12 to 13 I went south on lot 12 from my house almost to the meander line until I came to the corner of lot 13. Then I crossed a little corner of Schlosser's land. We had in the pasture lots 4, 7, 8, 9, 10, 11, 14 and 15 of swamp land. Lot 4 was divided off. The rest were all fenced in. We practically had the south half of section 30 and the south half of the north half of section 30 in pasture. Hemphill built his fence between his land and Schlosser's, until he came up to the corner of lot 12. I took it from there until we came around to the corner of Schlosser's grove back of his house. Then Schlosser built over to the corner of lot 13. He was to build the rest; but he stopped there. I put in the posts for the rest of the fence. Lee Hemphill and Alex Hemphill were present. Schlosser said he would put it in, and he put in part of it and then quit. We said we would put in our part; we would fence around there. Mr. Schlosser said that was all right. He would put in the west side, and we were to put in the east side. I put my side along lot 12, and Hemphill along on the south side of lot 15. Schlosser was to fence the south line of lot 13 and the south line of lot 14. The fence was to run along the meander line between Schlosser's land and the lands on lots 12, 13, 14 and 15. That agreement was made the latter part of May or the first of June, 1899, was made down near Mr. Schlosser's house; down at the meander line I think. After that Mr. Schlosser built part of the fence. Mr. Grout made the survey and found the meander lines. There was an agreement between Mr. Hemphill and Mr. Schloss-r about the running of that meander line. I was present near him when it was talked about. I said to Schlosser we ought to find that man that surveyed the land out. He said we would

get a man and survey it; he would furnish a man and pay half for the surveyor. That was before the fence was built.

We afterwards got Mr. Grout. After the fence was
95 built I was in possession of lots 12 and 13, and Mr. Hemphill in possession of all the rest lying north of the fence that ran along the meander line. Mr. Schlosser did not keep any portion north of the meander line for any purpose. Mr. Schlosser spoke about the land several times. One Sunday he and a couple of men were hunting on my land. I told Schlosser I didn't think it was a right thing to do, hunting on Sunday; that he ought not to come on my land. He said he knew I had possession there and could keep him off, and would go off if I said so. He afterwards asked the privilege to hunt there and let his men hunt there; and I granted it. I told him if he would let me go over his land I would let him hunt on my land. There is no established road coming up to lots 12 and 13 on section 30.

Re-cross examination:

Mr. Schlosser had a fence 6 to 10 rods south of the fence we built. It extends around a piece of plowing he had there. He had the land fenced on the east. He sold that fence to Hemphill before this. I was not present when he sold it. Schlosser may have built 20 rods of fence. I don't think it was more than 12 rods. It was right up by his grove from the southeast corner of lot 13 east to the first meander corner. That is the only fence he built. There was nothing said about Mr. Schlosser's water privileges being cut off. I could not say whether he had built up to that point before we had our agreement, or not. I cut the posts off lot 13. Schlosser said something about lot 13 being in litigation. He said he would put in the fence as soon as we got the decision on lot 13—the decision from the Government, from the receiver, I think, from Des Moines.

We got the decision in June. He put the fence in in June.
96 I don't know whether he appealed from that decision, or not.

I never received notice of it. I built my part before we got the decision. Hemphill built his before we got the decision. I built along in December or January, 1899. Mr. Schlosser simply built the fence out there a few rods and left the balance open.

RICHARD T. RYAN, recalled.

Mr. Schlosser made a statement to me along in the summer when I asked him when he was going to finish out the fence. It was after he built that portion of the fence; two weeks or a month afterwards. he referred to the decision on lot 13, where Mr. Schlosser had contested my homestead entry. There was a trial on that contest in Des Moines before the register and receiver in January, 1898.

Objected to as incompetent and immaterial and as not the best evidence.

The case had been decided by the register and receiver. It was decided in June, I think, of 1899. Mr. Schlosser was present at the trial with his attorney. My attorney notified me that an appeal had been taken.

Objected to as incompetent and immaterial, and not the best evidence.

Cross-examination:

There was nothing said about the decision when he first promised to build the fence. I pretend to say that with that contest still pending and in litigation he promised to build the line fence, and at that time he never said a word about the litigation. We were alone when he spoke about the result of the contest. I never had a shanty on lot 13. I entered it when I entered lot 12, in August or September; don't remember the dates; entered both lots at
97 once; Schlosser put his house on there in September or August, 1898. I took it off in December, 1899. It was in October, 1899, that Schlosser was hunting on my place. I drove over his land in the summer of 1899. I didn't ask permission.

JAMES VALLEY.

I live in Clay county; am 45 years old; am a farmer. I am acquainted with section 30, township 97, range 34. I live on section 27 in Lake township, two miles from the county line, and have lived there 14 years. I stopped with Mr. Hemphill last fall until about the first of March on his place in section 20. I have been over the land near Schlosser's house at different times within the last six months. I know where the boundary line is, that is, what is called the meander line. I have been over the land where the Beatty's live and where the Hemphill's live. There are two parts of the unsurveyed land. Lot 11 of the plat Exhibit 2 is grass land. Lot 15 is grass or pasture land. Lot 12 is part of what is called the island. The land south of the island is low land; kind of a wide leaf grass grows on that land; it is all grassed over, with a little water in the bottom of it. Lot 13 is the same kind of grass land and the same kind of timber land. It is all grassed over. The lake does not come down there. Over beyond water overflowed back in there when high water would come; but the lake itself does not run back in there. I saw the land yesterday morning. The grass was away above the water. I should think a fellow could walk through there with an ordinary pair of boots on right across from Schlosser's house to the land. We drove along the ridge of low land and across lots 13 and 14. There was no sheet of water there. We drove up to the water line and looked straight across. There was water
98 and there was grass and weeds growing up all over it. There might be places where they would not be as thick as other places; but there was grass and rushes and this wide leaf grass all

over the lake. It was last year's crop. I don't mean there was any new grass in there. I have saw cattle all over there last spring. I had a lot of cattle last spring and wanted to get them in there; but Hemphill had all he wanted. I have saw the cattle east of the island. During high water Mud lake is quite a body of water; and when it is not high water, there ain't much of a body of water there. Mud lake is higher than Trumbull lake, and drains into Trumbull lake, which drains into the Sioux river. Trumbull lake and Swan lake are not connected.

Cross-examination:

The land between Trumbull lake and Mud lake is grass land—pasture land. When water was high the drain would overflow and spread over. The channel might be 8 or 10 rods wide when the water was high. There would not be much current; but it would naturally be running into Trumbull lake. I could not say what one of ten years I have seen it that high. It would be covered for a short time. The water might be six inches deep. I saw the grass growing near Schlosser's house yesterday. It was rather short. It was just a continuous wide leaved grass. The cattle had eaten the tops all off. That is what made it short. It was probably six inches to a foot high. There was slush water in the bottom. I should think probably it came out of the snow up there. It was not a continuous sheet of water. These bogs would stick up all over the tract. It is not very select pasture land. I suppose it could be used as meadow land if it was dragged down. I expect to have some land on the west side of Lost Island lake. I have squatted on the piece between what is supposed to be the meander line and the lake shore.

99

Q. And are one of the contestants the same as in this case?

A. You was kind of helping to run me off it.

Q. Yes, sir, I will do the best I can towards getting you off.

A. And I will do the best I can to stay, too.

Q. So you are interested in the same question that is involved in this case in your own case?

A. I don't know as my own has got anything to do with this case at all. It is similar to it, I believe.

ALEX HEMPHILL.

Am 64 years old; reside in Lost Island township, on a farm; am the father of W. L. Hemphill, the defendant. I live on section 20, township 97, range 34. I have known the condition of this unsurveyed land for ten years. The low land in section 30 is grown up with vegetation on most of it; grass, rushes; and a lot of it is timber and brush. The biggest part of it is grass. This vegetation has grown over it all the years I have known it. On the north one-half

of section 30 there is two lots that is good farm land. That is where the Beatty's live. The land between there and what is known as the island is swamp. I have been over the swamp land a few times. The land between the island and Schlosser's is swampy. I seen it covered with water last summer. Two years ago I walked across the low land. I assisted in building a shanty for Ed O'Neil. The low, swampy land on section 30 at that time was moist and soft. I was present at the time Hemphill and Ryan was building some fence, and had a conversation with Schlosser as to the building of a line fence.

100 Objected to as incompetent and calling for a conclusion and an opinion of the witness.

It was last year—1899—Mr. Schlosser and my son, Lee, were there, and Mr. and Miss Ryan were in the wagon.

Q. Now, in that conversation what was said between the parties there?

A. The conversation there was mostly with Mr. Schlosser and my son. It was about starting in to build a fence. It was the latter part of May, two or three days after Grout had been there and surveyed. My son said to Schlosser, "I will start the fence at that corner down beyond here, and fetch it up around this corner right here by his cow yard, and you can take it there and go on to the lake. Or, you can commence down there and fetch it to this corner, and I will take it from here to the lake." He then said there was a little differance in the distance; there would be a few rods difference in the distance from there here. They seemed to have the figures and know how it was. Mr. Schlosser finally says, "Well, then, I will build the west half from here on." Then Mr. Schlosser turned to me and asked if I would have any objections to his squaring out—squaring out his land some way. He meant he wanted enough land to square him up, enough of the homestead of Ryan and the swamp land. He did not say that he would be willing to pay for it. Lee Hemphill said that he wanted to build the fence right away; and after they had agreed on this certain corner, Mr. Schlosser said, "Go ahead, then, and I will take it when you get here." I assisted in building that portion of the fence my son agreed to build. Mr. Schlosser came out there to me. I was getting a couple of sticks. He helped me a little. This must have been about three days afterwards. Mr. Schlosser went to work and his man came with more posts and the wagon and him and me and W. L. went out to the next lot 16 or 18 rods. Mr. Schlos-
101 ser hunted a stick the surveyor had stuck and that the cattle had knocked down. Mr. Schlosser and Hemphill said that Grout had stuck the stick there. He found the stick. They were at work building the fence along the portion of land he had agreed to build. I remember a conversation that occurred between Schlosser and W. L. Hemphill at the store of Furlong & Berg, at Ruthven. Don't remember the date—some time in May, 1899. It seemed to

be about a fence my son had bought. He paid him the balance of the money—$20. They went back to make a receipt, back to a writing place in Furlong's store. They came back after a few moments. W. L. says: "Well, George, then it is all right," and George said, "Yes, you can go ahead." Schlosser went out of the store ahead and Lee went after him inside of a minute.

Cross-examination:

I think it was in 1898 that Ryan went on lot 12. It is my opinion that Schlos-er had possession of lot 15 in 1898. My son claimed to have bought it last spring, a year ago. I could not state where the fence was they were talking about in the store. It was a fence Mr. Schlosser had on this land somewhere.

Re-direct examination:

I came to northern Iowa in 1854; settled in Floyd county in 1854, and in Clay county about 25 years ago. I saw the land in and about section 30 and Lost Island lake. When I came into the country we passed through by the stage road. That was when I was moving from Floyd county to Clay county; I think 25 years ago the 29th day of last month. The stage road run right on the north shore of Lost Island lake, along the south side of the south half of section 30.
The road run right over the ridge. There was no connection
102 between Lost Island lake and what has been testified to here as "Mud" lake. From what I have known of the land since I saw it it is simply a general knowledge of the land in northern Iowa. I think Mud lake is in practically the same condition in the last ten years that it has been previous to that time as to overflow—some years more water, and other years dry. It depends a great deal on the amount of snow that fell in the winter and the rain fall in the spring. I am somewhat familiar with the outlet from Trumbull lake to the Sioux river. There is quite a descent. The water runs rapidly in the spring. I have been there fishing years ago.

Q. In your opinion, would it be, or would it not be, an easy matter to ditch out that drain successfully; drain Trumbull lake into the Sioux river by ditching the outlet of Trumbull lake?

Plaintiff objects as incompetent, irrelevant and immaterial; and he has not shown himself competent to testify.

A. Yes, sir; I presume it would.

Trumbull lake is northeasterly from the Sioux river. What has been testified to as Mud lake is south and east of Trumbull lake. I never saw Trumbull lake entirely dry. The fish would come up out of Trumbull into Mud lake in the spring in the first break-up. They were coming out of the outlet of the one and the inlet of the other where the water was running rapidly.

Re-cross examination:

I had saw Mud lake two or three times prior to ten years ago. I don't know that all of the lakes have receded in the last ten years. I don't suppose there would be as much water flow out during a year now as there would have been, take it as an average. There
103 used to be quite a large body of water in Elbow lake near Ruthven. It used to look as though vegetation grew stronger there.

By the COURT: No, no! Answer his question! He asks you if that has been dry in the last ten years. He ain't asking why that is true or is not true. He asked you if that is not true.

A. Not near all the time. It has dried up some.

HIRAM DAVS.

I live at Milford, Dickinson county; have lived there some 36 years. Came to this country 36 years ago last June. I was at Lost Island and Mud lakes the next July on a hunting excursion. There was some four or five of us. We were there nearly a week. We were on the island at that time; walked over from the south side. We were camped on the isthmus between Lost island and the lake. We took a notion to go over and explore the island, and walked over. I was shown the other day where Mr. Schlosser's house is. We camped on the premises north of Anthony's, and walked over from there to the island.

Q. What was the condition of that low land at that time?

A. We considered it a slough—a rush slough. We used to call it the Lost Island slough; grass, rushes, vegetation of different varieties growing there. Old grass on the ground under the fresh grass. The sod was thick and heavy. We could drive right across it with a wagon at that time. We drove about half way from the island behind Schlosser's house down across to the timber point with a pair of mules and a heavy wagon. Near to and east of the island and point the land was very near the same; a little more water on the north side than the other. I think there was bigger rushes and more grass.

104 Q. That is now called Mud lake? What was the condition of that?

A. There was not much water on the point of it; but after we come down to where the county line is below that there appeared to be more water. There was not so much grass and rushes down there.

Q. What is the fact as to whether there was grass and rushes all over it, or not?

A. Why, we supposed that there was nothing but grass; just a slough, rat houses occasionally where there was enough water to

make one or to have one. It is a very uneven piece of land—rolling; kind of mounds and sags in it.

Q. You mean that piece represented as a lake?

A. Yes, sir; up through there.

Q. What was the appearance of that place at that time as to whether there was a lake in there or not?

A. We didn't consider any lake in there.

We didn't consider it a regular lake. We didn't consider that in the lakes grass and rushes would grow to that extent. They were growing very nearly all over it. It was a good place for ducks and geese. We camped a little south of what has been designated as the "point." There is quite a high raise there, and we camped right on the bank of the slough. I next saw the ground about in October of the same year. It was about the same condition, but a little wetter. And then I saw it next about a year from that time. It was in very nearly the same condition then; perhaps a little wetter, or perhaps a little drier. I could not recollect; we had so many bad places and sloughs them days to contend with. I was teaming, moving trappers, drawing freight from Ft. Dodge, Webster City and De Moines. We had to get our flour at Webster City in the early seventies. Some years it was pretty
105 wet going through; more or less sloughs all over the country. We had to dodge them and work around them and go across them sometimes. There were years that the water was a good deal lower than it was at other times. When we had a heavy fall of snow or rain the sloughs would be full. When it would evaporate they would settle down. I could not say whether I saw the land around Mud lake during the seventies or eighties after they got the road through to Emmetsberg—the old stage road by Anthony's. We used to drive through that way. I think the old Milford route run up somewhere near Mud lake across the place of Hemphill. Some years that inlet there was pretty bad. Some years it was passable, so a team could draw a ton right through. Some years we would mow off grass and throw in and drive across. Other years it was pretty well dried out. Okoboji lake and East Okoboji lake I have seen the water there so no water ran down from that lake into the upper Gar—in those early years, the same years I am speaking about. During the time I have known this country there has been wet seasons and dry seasons. I saw this land on section 30 a couple of days ago. There is no such vegetation now at the present time; because it has been fed off and tramped down. There was more grass, more rushes and more sod on it when I first saw it. There has been cattle run over it. A man with a pair of rubber boots could walk over it now. I never saw any lake south of the island.

Q. And as I understand you, that ground in there that is now called Mud lake, when you first saw it, looked like a big slough?

A. Looked like a big slough; yes, sir; that is, all the upper part of it, toward the island.

106 Cross-examination:

Thirty-six years ago the first day of last June I came to Dickinson county and camped at Okoboji. I came there alone. I camped the same year in July near Lost Island lake on that bar. We were hunting duck and geese and elk and deer. None of us were living there at that time. We came from Spencer and drove around Lost Island lake. I am not positive as to the exact spot we were; but it was somewhere near there. I seen the land pretty well covered with water at the time of the big snow a number of years ago. The island was surrounded with water; but there was rushes and grass all over it. I think I quit freighting and driving around that lake in 1878 at the time they got the railroad to Sibley.

ED M'NALLEY.

Deputy sheriff of Palo Alto county. I remember the date of the snow fall in March, 1900. It was on the night of the 27th we had the heaviest snow. It started snowing a little in the afternoon of the 27th; snowed that night and on the 28th, and a little on the 29th. The 27th was on Tuesday. It seems to me the Sunday following the snow was about all off. I didn't make any measurements, but on Wednesday afternoon I drove out into Island township, and I thought it was about eight inches deep.

Cross-examination:

I have not noticed any difference in the volume of water in the creeks and rivers. They did not come up to the ordinary high water marks in the streams. The snow went off in about four days.

107 Re-direct examination:

There was a few places it drifted, so we had to leave the road; and when we got off the main traveled road and went through the low places, it was very heavy. I did't notice whether the melting of the snow raised the small ponds and low depressed places in the ground.

Defendants offer in evidence Exhibit "No. 2," being a plat of the additional surveys of sections 19, 20, 29 and 30, township 97, range 34, sections 25 and 36, in township 97, range 35, together with the surveys and letterings of the Commissioner of the General Land Office and the receiver of the United States land office at Des Moines, Iowa.

Plaintiff objects as being incompetent, irrelevant and immaterial, and it purports to be a copy, does not bear the official signature of any official of the Government, is not signed by any officer of the Government, it has not been shown that there is any such certificate, and the officers making such certificate had no jurisdiction, power or authority to make it.

Defendants withdraw that offer for the present.

E. B. EVANS.

I am attorney at law; live at Des Moines, Iowa.

Q. What connection have you had, if any, with the proceedings for the resurvey of what is known as the unsurveyed land in sections 19, 20, 29 and 30, township 97, range 34?

A. I was the attorney for the applicants, W. L. Hemphill, A. Hemphill, William and Edward Beatty, and acted as the swamp land agent for Palo Alto county, prepared the application for resurvey and secured the evidence that was submitted to the Secretary of the Interior.

The Commissioner of the General Land Office forwarded
108 the application to the Secretary of the Interior for instructions. I have seen the original decision of the Secretary of the Interior under date of March 8th, 1898. Exhibit "25" is a copy of that decision.

Objected to as not the best evidence, and as immaterial.

I know that the Land Department sent, or that there was a man on the ground making a survey; that, thereafter, there were plats filed in the local land office at Des Moines, Iowa, of the survey, and field notes filed with the secretary of the State of Iowa, and a decision on file in the local land office, of the Secretary of the Interior, of June 25th, 1898, approving the plat and field notes.

Plaintiff moves to strike out the answer as incompetent, irrelevant and immaterial, and stating secondary evidence.

I have inspected the original plat and field notes. Exhibit "31" is a true copy of the field notes on file with the secretary of state. Exhibit "2" is a copy of the original plat now on file in the office of the register and receiver of the United States land office at Des Moines, Iowa. I saw the man making the survey. He said his name was A. W. Barber.

Plaintiff moves to strike out the last statement as hearsay and incompetent.

I was there in April, 1898. There were two young men assisting him. I have been over the land a great number of times since 1897, and personally inspected it in procuring evidence for the application for resurvey and in arranging evidence in this case. I have seen the original plat of the resurvey. When the original plat was first filed in the local land office before the land was opened to entry, I personally made a copy of it, traced it on tracing paper;
have examined the original plat in the trial of two cases be-
109 fore the register and receiver, and have no doubt but that the plat Exhibit "2" is an exact copy of the original plat now on file, and it fairly and truly represents the land.

The defendants now renew the offer in evidence of the plat Exhibit No. "2," together with the certificate of the receiver of the United States Land Office and the Commissioner of the General Land Office.

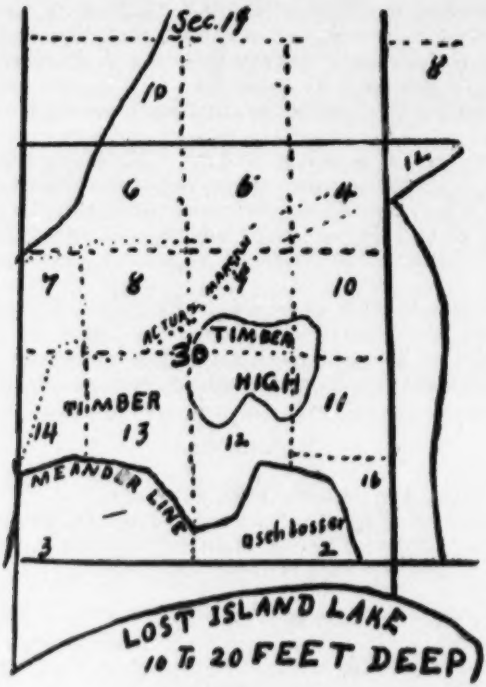
Mr. A. C. PARKER: Upon this offer I want to ask Mr. Evans, on cross-examination, one question.

Q. This blue print is simply a copy, is it not?
A. Yes, sir.
Q. And the certificate is a copy?
A. Yes, sir.
Q. It does not bear the true signature of the Commissioner?
A. The certificate of the Commissioner of the General Land Office is a copy; the certificate of the register of the United States Land Office is in his own handwriting.

Defendants' Exhibit No. "2" is objected to, that it does not contain the certificates of the officer in whose custody it originally was; the oral evidence and certificate of the register of Des Moines is only a point to establish or prove the genuineness of the plat; and that prior to the making of the alleged survey the Government of the United States had parted with its title to the south half of section 30 by regular patent, issued and delivered; and at the time this pretended survey was made the officers of the department had no power or authority over said land, and no power or authority to resurvey the same; and this is true whether the original survey and plat thereof was made through fraud or mistake.

110 EXHIBIT 2.

"The plat of additional surveys in sections 19, 20, 29 and 30, township 97, north, range 34, west; and in sections 25 and 36, township 97, north, range 35, 5th P. M., Iowa; (formerly erroneously included in Lost Island lake); authorized by the Interior Department March 8, 1898; scale, 20 chains to an inch; area, 1230 acres; surveyed by A. W. Barber, detailed clerk G. L. O., April 2nd to 20th, 1898, under special instructions from the Commissioner of the General Land Office, dated March 24, 1898."



"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C., *July 20th*, 1898.

111 The above map of additional survey in township 97, north, range 34 and 35, west, 5th principal meridian, Iowa, is strictly conformable to the field notes of the survey thereof, on file in this office, which have been examined and approved.

"BINGER HERMAN,
"*Commissioner and ex-Officio Surveyor General for Iowa.*"

UNITED STATES LAND OFFICE,
DES MOINES, IOWA, *May* 1*st*, 1898.

I hereby certify that this is a true and correct copy of the plat of additional surveys in sections 19, 20, 29 and 30, township 97, range 34; and in sections 25 and 36, township 97, range 35; made by A. W. Barber and filed in this office, August 30th, 1898.

"THORNTON S. HOWARD, *Register.*"

It is understood that each of the exhibits that are now offered may be offered and the objection made immediately after the offer of the exhibits; which are Exhibits Nos. "22" to "30."

Defendants offer in evidence Exhibit "22," being a copy of the contest docket of the records of the United States land office at Des Moines, Iowa, in the case of George Schlosser *vs.* Richard T. Ryan; involving lot 13, township 97, range 34.

(See Exhibit "G" of defendant Ryan's answer.)

Defendants offer in evidence Exhibit "23," being a copy of the records of the register of homestead entries of the United States land office at Des Moines, Iowa; showing homestead entry of Richard T. Ryan for lots 12 and 30, section 30, township 97, range 34.

(See Exhibit "A," of Richard T. Ryan's answer.)

112 Defendants offer in evidence Exhibit "24," being a copy of miscellaneous docket records of the United States land office at Des Moines, Iowa, of the filing of the homestead application of George Schlosser for lots 13 and 14, section 30, township 97, range 34.

EXHIBIT 24.

"Date of filing, August 30th, 1898, 9:24½ a. m.

George Schlosser, Ruthven, Iowa, lots 13 and 14, section 30, township 97, range 34, about 80 acres; held for rejection September 16th, 1898. Contest affidavit filed October 10th, 1898."

Defendants offer in evidence Exhibit "25;" the same being a copy of the decision of the Secretary of the Interior, March 8th, 1898, directing the survey to be made of certain unsurveyed lands in sections 19, 20, 29, and 30, township 97, range 34.

EXHIBIT 25.

"Secretary Bliss to the Commissioner of the General Land Office.

By your office letter dated January 26th, 1898, you transmitted for departmental consideration application for survey of certain lands situated in sections 19, 20, 29 and 30, township 97, range 34.

The application appears to have been served upon the owners for the lots bordering upon the lake. The applicants allege that meandering lines of said lake are wholly wrong; that the line established as a meandering line through sections 19 and 30, was from sixteen to forty-nine feet above high-water mark of said lake. That the meandering line on sections 20 and 29 is from thirteen to twenty-nine feet above high-water mark of the lake. That from the configuration of said land, there is not now, and was not at the
113 time of the official survey, any reason or facts that could possibly be construed as justifying the meandering lines as established. From the official plat of said township it appears that the lake extends into four townships; viz.: Townships 96 and 97, range 34 and 35, is about five and a half miles long, and from a half a mile to a mile and a half in width. The case of Grant *vs.* Hemphill, 92 Iowa, 218, is cited in brief of the counsel for the plaintiffs; which involves the greater part of section 19; wherein it was held by the supreme court of Iowa that the land "is not now, and probably never was any part of a lake." In Noyes *vs.* Collins, 92 Iowa, 566, the supreme court of Iowa held that the title of riparian owners does not extend beyond the natural shore. In view of the showing made and the decisions of the supreme court, it is deemed proper to institute an inquiry into the facts. You are, therefore, directed to send a special agent to the locality to make special examination into the land in question, the position of the lake past and present, and submit his report, when made, to the department."

Defendants offer in evidence Exhibit "26;" decision of the Secretary of the Interior of the United States, under date of June 25th, 1898, approving the survey as ordered in Exhibit "25."

EXHIBIT 26.

"The Secretary to the Commissioner.

March 8th, 1898, you were directed to send a special agent to the locality in question to make examination relative to the Government survey of land in the State of Iowa, situated in sections 19, 20, 29 and 30, township 97, range 34. On the request of your office, the department, March 17th, 1898, detailed Amherst W. Barber to make the examination and survey. In your letter of June 13th, 1898,
114 you transmit the report of Mr. Barber, dated April 2nd, 1898. Mr. Barber states that he has arrived at the conclusion that the land in sections 19, 20, 29 and 30, township 97, range 34, and a portion of the land in sections 25 and 36, township 97, range 35, were erroneously returned by the deputy surveyor in 1855, as covered by lakes. That there is no reasonable doubt that the pretended meandering of the lake was improper and almost wholly fictitious; and that the land should be surveyed and disposed of as public

land. With his report Mr. Barber submitted a plat showing that the land in question is mostly agricultural in character, with a wet, marshy pond, called Mud lake, covering portions of sections 25 and 30, with an outlet going west into Trumbull lake. He also shows that there is a body of deep water in sections 31 and 32, township 97, range 34, separated from the land to the north by a sand ridge twelve feet high. From his report, it appears that there *has* been surveyed by him 1230 acres additional, 533 71-100 acres as swamp land, the remainder farming land. I see no reason why the survey executed by Barber should not be approved, and the land disposed of as Government land."

Defendants offer in evidence Exhibit "27," copy of list No. 64; lands reported as swamp and overflowed lands, together with copy of the certificates thereto attached, signed "Binger Herman, Commissioner and *ex-officio* surveyor general of Iowa."

EXHIBIT 27.

"List No. 64. Swamp and overflowed lands, within the meaning of the act of September 28, 1850, by the field notes of the surveyor, of April 2nd to 20th, 1898. Lots 11, 14 and 15, section 30, township 97, range 34."

Defendants offer in evidence Exhibit "28," certified copy
115 of approved list No. 41 of swamp and overflowed lands in sections 29 and 30, township 97, range 34, together with the certificates thereto attached.

EXHIBIT 28.

"Lots 11, 14 and 15, section 30, township 97, range 34," (with other lands).

GENERAL LAND OFFICE, DIVISION OF SWAMP LANDS,
WASHINGTON, D. C., *January 20th*, 1900.

This certifies tracts of land embraced in this list are claimed as inuring to the State, under the swamp land act of September 28th, 1850, that the character of the land as swamp and overflowed is established by the field notes of the survey of A. W. Barber; that the records of this office show no claims adverse to that of the State of Iowa, to any of the tracts described.

R. C. LEVY, *Examiner.*
SAMUEL W. SNOW,
Chief of Division.

January 22, 1900.—The tracts of land embraced in this list, Iowa swamp list, No. 41, are decided subject to the approval of the Sec-

retary of the Interior to be swamp land and to inure to the State under the swamp grant.

BINGER HERMAN,
Commissioner.

January 24th, 1900.—This list, Iowa swamp land list, No. 41, is hereby approved.

E. A. HITCHCOCK, *Secretary.*"

Defendants offer in evidence Exhibit "29," being a copy of the contest docket of the records of the United States land office,
116 Des Moines, Iowa, in the case of The State of Iowa and Palo Alto County *vs.* J. W. Smith *et al.*, involving titles to lots in section 30, township 97, range 34, (with other lands).

EXHIBIT 29.

"Lots 11, 14 and 15, of section 30. State of Iowa and Palo Alto County *vs.* J. W. Smith *et al.* The parties mentioned in the title of this case having filed non-swamp land affidavits, hearing was ordered October 28th, 1898, by the register and receiver, to determine the swampy or non-swampy character of the land, hearing to be held on September 8th, 1898. April 3rd, 1899, the register and receiver rendered their decision in favor of the State and Palo Alto County. Case reported to General Land Office June 1st, 1899. June 13th 1899, Commissioner rejects all claims adverse to Palo Alto County, and closes the case, except as to lots 14 and 15, section 29."

EXHIBIT 30.

Defendants offer in evidence Exhibit "30," being a certificate of Thornton S. Howard, register of the United States land office at Des Moines, Iowa, that the foregoing Exhibits "22" to "29," inclusive, are true copies of the records of the United States land office at Des Moines, Iowa.

Plaintiff objects to Exhibits Nos. "22" to 29," inclusive, and to each thereof separately, for the reasons urged in objections to Exhibit No. "2." And further objects to the exhibit with reference to the contest with Schlos-er, that it is immaterial and irrelevant; and that said proceedings, if any, does not constitute an estoppel against the plaintiff, nor bar him from insisting upon his title obtained from the chain of title alleged and proven in this case; and
117 objects to the copy of the decision of the Secretary of the Interior for the additional reason that it is simply a copy made by a person or officer not having the custody and control of the original decision; and the same objection to the copy of the decision of the Secretary of the Interior of June 25th; and objects to

the copy of swamp land list as incompetent, irrelevant and immaterial, and not certified to by the officer having charge of the original list; and the certificate is not competent to prove or establish such list. And makes the additional objection to the copy of the contest that was made to the application and records of the contest of Schlosser.

Defendants offer in evidence Exhibit "32," being a copy of the decision of the Commissioner of the General Land Office, rendered on the 13th day of June, 1899, in the case of The State of Iowa and Palo Alto County *vs.* J. W. Smith, *et al.*, involving lots 11, 14 and 15.

EXHIBIT 32.

"Decision of the Commissioner of the General Land Office, under date of June 13th, 1899. On appeal from the decision of the register and receiver of April 3rd, 1899; approving their decision and holding lots 11, 14 and 15, section 30, to be swamp and overflowed lands."

Defendants offer in evidence Exhibit "33," copy of decision of the register and receiver of the United States land office at Des Moines, Iowa, in the case of George Schlosser *vs.* Richard T. Ryan, involving lot 13 of the Barber survey, in section 30, township 97, range 34.

EXHIBIT 33.

"The land is a part of the tract of 1230 acres in Palo Alto
118 county, opened to entry August 30th, 1898. On opening day the following persons made application in the order mentioned, each applicant including the lot in question: Richard T. Ryan, Ruthven, Iowa, lots 12 and 13, section 30, township 97, range 34; application filed at 9:10 a. m. George Schlosser of Ruthven, Iowa, for lots 13 and 14, section 30, township 97, range 34; application filed at 9:24½ a. m. George Schlosser was notified September 16th, 1898, that his application conflicted as to lot 13 with the entry of Richard T. Ryan; and as to lot 14 with the swamp land selection of Palo Alto county. As to lot 13, he filed affidavit of contest October 10th, 1898. October 27th, 1898, the register and receiver ordered a hearing to be held before them at the United States land office at Des Moines, Iowa, on December 7th, 1898. George Schlosser appeared in person and by his attorney, J. F. Conrad. Richard T. Ryan appeared in person and by his attorney, E. B. Evans. Each submitted their evidence, and the taking of testimony closed. From the evidence we find that George Schlosser lives on lots 2 and 3, section 30, township 97, range 34; that the lot in question, together with lot 14, adjoins his farm on the north, and that Schlosser's application for lots 13 and 14 was for an adjoining farm homestead.

Concerning Richard T. Ryan, we find that he is a citizen of the United States. That on August 5th he bought of one Ed O'Neil a house on lot 12; that he moved into said house on August 8th, 1898. He being qualified to enter said tract under the homestead law, and being a resident on the land in question at the time said land was opened to entry, and having made the first filing on opening day, we see no reason why his entry should be canceled. The entry of Ryan will remain intact, and the application of Schlosser be rejected. Thirty days were allowed to appeal to the Commissioner of the General Land Office."

119 Defendants offer in evidence the certificate of Thornton S. Howard, register of the United States land office, that the foregoing Exhibits "32" and "33" are true copies of the original records of his office.

The plaintiff objects to each of said exhibits, "32" to "33," inclusive; and makes the objection to each separately, the same as to Exhibit No. "2," and to each of the exhibits "32" to "33," inclusive.

P. V. HAND.

I am county auditor of Palo Alto county.

Q. Examine Exhibit 2 and Exhibit 31 and state whether or not they are documents on file in your office, in the office of the auditor of Palo Alto county?

A. My filing don't appear on these, but those papers have been on file in my office since about May, 1899—both of those exhibits.

Cross-examination:

Q. They never have been filed there, have they?

A. Yes, sir; I sent for them, myself.

I sent for those papers at the land office. The plat, I believe, is certified to. I don't believe I sent to the secretary of state for Exhibit 31. I don't know as I sent to the secretary of state; I believe I sent to the land office at Des Moines; and Exhibit 31 is that copy. It has not been in my office all the time. I gave it to Mr. Moreling the other day.

The defendant renews the offer of Exhibit No. 2.

The plaintiff makes the same objection to Exhibit No. 2 as heretofore made.

120 The defendant offers in evidence No. 31, being the copy of the field notes of the A. W. Barber survey of the land in sections 19, 20, 29 and 30, township 97, range 34, certified to as true copies by G. L. Dobson, secretary of state.

The plaintiff objects for the reasons assigned for objections to Exhibit 2 and Exhibits 22 to 30, inclusive; and that exhibit is not certified to by any officer having the custody and control of the

original field notes. It is not certified to by the Commissioner of the General Land Office, but is simply a copy made by the secretary of state of the copy of the original field notes, and is secondary evidence, and incompetent and not the best evidence.

EXHIBIT 31.

Chains.

80.25 Intersect accepted cor. of sec. 19, 24, 25, 30 an oak stake marked 24 in., old mound 1 ft. high and small pit W. fences corner here at base of hill and edge of heavy grass flat dry. High prairie farming land 79 chs.

.....

Thence south bet. secs. 25 & 30. Entering marshy ground, heavy grass and 3 inches water in some small places.

20.00 Rise 2 ft. to sand ridge, brs. nearly E. & W.

24.40 Top of ridge, No evidence of a M. C. found.

.....

21.00 Margin of water. Coarse grass, weeds, fences and musk rat houses all over Mud lake showing uniform shallow water and level bottom. Estimated depth 1 to 1½ feet.

.....

43.00 Cross roads bears S. 80 degrees E. about in front of Schlosser house.

44.35 Top of swell by fence and descent in corn-field.

121

54.00 Dry marsh pasture and knolls thence level

65.42 Set temp. M. C. in level pasture. No signs of old corner.

72.06 Intersect fence corners of sections 29, 30, 31 and 32. Here I find an old stake or post 2½ in. square 2 feet above the ground, set in frozen soil well seasoned burr oak. heart wood bearing marks nearly erased by weather, showing curves of a marking gauge, and in three places the central point or hole made in the center of the curve is visible. The marks seem to read S. 32 on one side, no marks apparently on the other. Mr. John Crookshank testified to me his opinion of the identity of this post as a mark set by the original surveyors and I accept it as such. See copy of affidavit attached to this report page 22.

.....

Begin at cor. of secs. 19, 20, 29 and 30 and run S. 88 deg. 37 min. W. bet. secs. 19 and 30 across dry marsh.

5.75 Open water of the "inlet" 50 lks. wide, thence on solid flat.

16.00 Ascend gentle slope.

30.00 Top of broad ridge 10 ft. high. Descend.

34.00 Enter marshy grass flat.

40.00 Drive oak stake in bottom of hole to depth of 4 ft.

45.00 Leave flat ascend beach 25 feet
48.00 Top of same, brs. N. & S.

.....

69.30 I drive to shore of Lost Island lake, south of cor. of secs. 29, 30, 31 and 32 and use leveling rod. Find the sand ridge of north shore is 12 to 14 ft. high above water level and the marshy ground at said sec. cor. is 9 7-100 feet above level of said lake.

122 Proceed to the outlet of Mud lake in sec. 25 and set instrument in graded road near bridge. Telescope is 9.95 ft. above water level of Mud lake and 9.02 ft. above bottom of dry run or natural ditch 2 to 5 ft. wide on west side of road. Hence a rise of 7 inches in the pond would cause water to flow in said outlet, westward and a rise of two feet would cover the broad grassy flat on each side of it west to Trumbull lake.

.....

Begin at cor. of secs. 29, 30, 31, 32 and run south bet. secs. 31 and 32 across a level bottom.
3.78 Leave black muck land and ascend sandy.
4.00 Road bears E. & W. ascend to plowed sand flat.
4.50 Sandy plateau—cultivated—10 feet high.
6.28 Brink of narrow ridge 12 to 14 ft. elevation, Descend over sand and gravel.
6.90 Water of large deep lake.

.....

General Description.

After careful examination I report my opinion that the tracts which are more than one-half swamp and overflowed land within the meaning of the act of Sept. 28, 1850, are as follows:

In sections 29, lots 12 and 13.
" " 30 " 4, 6, 7, 8, 9, 10, 11, 14, and 15.
" " 25 " 6, 7, 8, 9, 10.
" " 36 " 8.

The other tracts are either *all* or more than one-half good high farming land, free from swamp and over-flow.

All the land surveyed, except the marsh of Mud lake are considered worth from 20 to 25 dollars per acre.

A. W. BARBER,
U. S. Surveyor.

123 BELA RYAN.

Live on lot 7, section 36, township 97, range 35, in Clay county. Have lived there going on two years. I am a sister of Richard Ryan, and sister-in-law of W. L. Hemphill. I am familiar with the south half of section 30. Richard Ryan has lived on lots 12 and

13 about two years. I have frequently been with him to his place, sometimes been there three or four times a week. Have traveled across from his place with him with horse and buggy—traveled west and northeast. When we traveled west we went across a ravine over lots 13 and 14. In going northeast we would go on across lots 9 and 10 and lot 4. I have crossed that ground a number of times. It was generally quite dry. Sometimes it would be wet. We never got swamped. The land south of the island was generally wet; but not so but what we could cross it riding back and forth. I was with Mr. Hemphill when he and Mr. Schlosser had a conversation in regard to the sale of a fence. The first talk was about the 20th of April last, in Mr. Schlosser's yard. Mr. Hemphill and Mrs. Hemphill and Mr. Schlosser and myself were present. I believe Mrs. Schlosser was outside the door. They were going to look the fence over at some future time, and would sell the fence when they looked it over. I was present at an interview later. A few days after Mr. Hemphill, Mr. Schlosser and myself were present. Mr. Schlosser said that they would not have any trouble in selling the fence; that Hemphill had the land, and he would sell them the fence. They would have no trouble in selling the fence, as the fence was on Hemphill's land. Schlosser said that. That is about all they spoke about the price.

Plaintiff moves to strike out the conversation as to who had possession of the land, as being incompetent and a conclusion of the witness.

124 Cross-examination:

I settled on lot 7 in Clay county, part of this unsurveyed land. I homesteaded it. I don't know as I am interested the same way my brother is. I am trying to keep my homestead. I am living on it. This fence was on the land Mr. Hemphill had bought from the county. Mr. Schlosser claimed to own it. I didn't hear any talk about anything else being sold at that time. I didn't know of anything else being sold. All that he said was that Hemphill now had the land, and he would sell him the fence. I think the conversation about the fence was in April, 1899.

Re-direct examination:

I live on lot 7, section 36, township 97, range 35, as shown by Exhibit 2. I have been served with notice of a suit by Mr. Schlosser claiming that land. He is also claiming lot 8, next west of me. He has brought suit in Clay county claiming both these lots.

Re-cross examination:

He don't claim those lots over there as a part of his land in section 30; claims it in Clay county. I presume he owns land in Clay

county. I took lot 7 as a homestead; claim it is unsurveyed land, because the meander line runs south of lot 7.

W. L. HEMPHILL, recalled.

I know of the resurvey that was made by Barber; was present during a part of the survey. I have seen the plat of his survey. Exhibit 2 is a copy of the plat. The principal part of lot 15 on section 30 of this plat, Exhibit 2, is swamp land—
125 marshy grass land. It can be used for pasturing and mowing purposes, for grass and hay; could have been so used ever since I knew it. Lot 11 is principally the *the* same, it may be a trifle wetter than 15; been pastured the last ten years to my knowledge. No seasons since I have known the land in those lots but what they were capable of being so used. The land south of the island on lot 12 is similar to that of lot 15. It can be used for pasturing and mowing. I should think somewhere about 12 acres of lot 12 is subject to overflow and about 40 acres is not subject to overflow. I should judge about 15 acres of lot 13 was subject to overflow. Lot 14 is a little wetter than those other two; 10 or 12 acres of high land on lot 14. The balance of the lot is growed up to reeds and rushes, and not susceptible of any use the biggest part of the year. I know what is commonly designated as Mud lake. There is no part of it on lots 11, 12, 13 and 15. There is a part of it on lot 14; somewhere from 14 to 16 or 18 acres. Lot 10 has always been used ever since I lived down there. Prior to that it was used a number of years I know of.

By the COURT:

Q. What for?
A. Pasturage.
Q. What is it used now for?
A. Pasturage.
Q. Ever been used for anything else?
A. Yes, sir; there has been hay cut on it.
Q. Ever been broken up or tilled or cultivated?
A. No, sir; it has not, that I remember of.
Q. When was hay cut on it?
A. I could not say what years; but I was over there once when Mr. Cruickshank had hay on there.
Q. How much?
A. They had a couple of stacks in there. I don't know
126 just how much hay they did cut; it partially came off from lot 11.

Lot 9 has some dry land, and it has got some a little wetter yet. Mud lake comes on lot 9. Lot 8 catches what is known as Mud lake in Palo — county. I saw the principal part of lot 8 in crop; and lot 7 was in crop the same year. Lot 4 can be used for pasture land

or meadow. I have known of it being pastured for 17 years. Lot 5 has about 21 acres high land; the balance is low. The low land is good for pasture or mow land. Lot 6 is a trifle wetter than 5; has not quite so much high land; about 16 acres can be cultivated. The principal part of the balance can be used; a little bit in the corner of that is grown up to reeds and rushes. What is known as the unsurveyed land in sections 20 and 29 is high, dry, rolling prairie land. There is no lakes or any indication of any lakes on any of that land. Part of the unsurveyed land in sections 25, 36, township 97, range 35, is rush land, rush ponds, and part of it is high, dry land. Exhibit 2 correctly shows the outlines of what is practically known as Mud lake. I have seen the lake dried out. In the fall of 1891 was the first time I saw it dry. Again it was dry in 1894 and 1895. I claim lots 11, 14 and 15, in section 30, township 97, range 34, by purchase from Palo Alto county under the swamp land title. I also bought the right of the swamp land agent, and have his interests. I had an interview with Mr. Schlosser with reference to the purchase of the fence that he had on this land that I now own. He owned the fence that starts in at the southeast corner of section 30, and runs north to the next section corner and a little east of the half section corner; it starts there and runs northwesterly over to the southwest corner of lot 4, then down across the half section line on the west, then south to the meander corner. The first interview I had with him was about April 15th, at his
127 place. I drove up there one evening and told him I had bought that land. I wanted to put in a fence or else buy his fence. He told me he would sell his fence. If I had bought the land he would sell me the fence. After that I went around to his house, and we figured up the amount of the fence, and it came to something like $22.00. He said, "I will have to have $25.00 for that fence." I said, "I will give you $25.00;" and I gave him $5.00. I told him when we drew up a writing in regard to the fence I would pay him the balance that afternoon, in town, which I did. He consented we should describe the fence and the possession of the land. And we went into Mr. Furlong's——

By the COURT:

Q. Yes, but what did he say?

A. I says We will describe the fence and the possession of the land; and he says All right, so we went, and I drew up the writing, and I read it, and Mr. Schlosser took it and he read it, and then he signed it and handed it back to me.

Mr. Schlosser had occupied the land the year before. I drew up receipt, Exhibit 3, on Mr. Furlong's desk, in Furlong & Berg's store. Schlosser was right there. I read it over to him; he took it and looked it over, and signed it and handed it back to me. The last words were there at the time he signed it. Nothing has been added to it since. I had had a talk with him about possession. He didn't say possession at the time Mr. Ryan and I went to sow our oats

some time in April. Schlosser had forbid our going across the land. I said I suppose we will have no trouble in regard to the fence. He said, "No; you own the land, so we will have no trouble in regard to the fence." Schlosser and I agreed to get Mr. Grout. He said for me to send for him and he would pay half; and we would have the meander line run, and put in a division fence. I told him all right, I would do it. I got Mr. Grout; Schlosser furnished a Mr.
128 Rhinehart. The meander line was run. I had a conversation with Mr. Schlosser about dividing up the fence. We went over to build the fence; drove around by Schlosser's. I asked him what part he wanted to build. He said it didn't make any difference to him: I told him I would build the east part of the fence as the west part bordered up close to his house. He said All right, go ahead; I will put in my fence and will take it when you get here. Mr. Ryan and I built the east half. Mr. Schlosser built about 30 rods from the division point west. He has built no more. I have spoken to him about it since. He said he would build it right away. It run along to the last days of June or July; I said to him, "You haven't put in your fence yet." He said, "I will put in that fence as quick as I hear from the land office at Des Moines." I said, "That ain't what you agreed." He said, "That is what I'll do." Later on I spoke to him in regard to it. He said he would put it in when he got a decision from the United States land office. I said, "That ain't what you told me the other day." He said, "I think it is." I said, "You told me you would put it in when you got the decision from the register and receiver." He said," "I haven't got that yet." I said, "Don't you know that decision is given?" He says, "I haven't been advised so." I said, "You will never get that land, anyway." I told him he could not acquire an additional farm homestead for the reason that he owned 232 acres of land; that I had been told so. He said that his attorneys never advised him so. Later on in the fall I spoke to Schlosser about building the fence again. That was at the time my cattle were getting in his corn. I told him that if he didn't build that fence that I would build it right away. I put in the posts that day and the day after. I and Mr. Ryan have been in possession of the land north of the meander line. I am somewhat acquainted with Trumbull lake and with the outlet of Mud lake into Trumbull lake. Mud lake is higher
129 than Trumbull lake. The outlet of Trumbull lake is in the Sioux river. I think a ten foot ditch dug three miles toward the river would drain Trumbull lake, and would keep it drained at high water stages. It is about a half mile from Mud lake to Trumbull lake; and a five foot ditch from Mud lake to Trumbull lake would drain Mud lake entirely, and keep it drained. I have made an examination since I bought this swamp land with a view to draining it. That is my signature to Exhibit 35. It is the contract of purchase that I made with Palo Alto County for the land in controversy.

It is agreed that Exhibit 35 is a part of the records of the auditor's office of Palo Alto county without further identification.

The defendant offers Exhibit 35 in evidence, and asks that a copy of the same may be made in the record.

Plaintiff objects to the offer as irrelevant and immaterial.

EXHIBIT 35.

Contract of sale by Palo Alto County of lots 11, 14 and 15, section 30, township 97, range 34, to W. L. Hemphill.

The defendants offer in evidence Exhibit No. 3.

EXHIBIT 3.

(See amendment to answer of W. L. Hemphill.)

Objected to as irrelevant, incompetent and immaterial, and if a genuine instrument would be wholly immaterial to a well plead issue in this case. The receipt simply calls for the possession of the land; nothing in the receipt contained which relates to the title to the land. It is too indefinite and uncertain. It does not describe any land.

130 Cross-examination:

I have had no experience in draining large bodies of water. The Sioux river is about twelve miles from Trumbull lake. I think the ditch would have to be dug about three or four miles. I think the expense of digging such a ditch would be about $600. It would have to be dug about ten feet deep. I don't know what the expense would be. The soil of Trumbull lake is black, muddy soil. Some of it is yellow clay.

I bought this land from the county on the 15th day of April. I bought an undivided half interest from the county. I bought the other undivided half interest in August, 1898. I have a copy of that contract. I bought the other undivided half interest from Mr. Evans for $985; and from the county I bought the undivided half interest for $900. I hold those two interests subject to some money I have borrowed. I am relying on those two contracts and this resurvey for my title. I didn't say anything to Schlosser when I bought Mr. Evans' interest. The first thing I said to him about possession was after I bought from the county. I told him I had bought all the land and wanted to buy the fence. He said that we would go and measure the fence any time it was convenient. Mr. Schlosser looked dazed for a moment and said, "Well, well!" and said, "If you have bought the land I don't want any trouble and I'll sell you the fence." And when I bought the fence I told him I

would give him $5 then, and pay him the balance that afternoon in town when we drew up a writing. I wanted a writing to show that he had given me the fence and possession without any trouble. When I went out there I had a doubt that he would possibly not give up possession. But he did give up possession. At that time Mr. Ryan claimed to own and be in possession of lots 12 and 13.

I had specified that I had bought the swamp land. I con-
131 sidered the possession of lots 12 and 13 was in Mr. Ryan.

I suppose I sat there at the desk in practically the same position while I was writing Exhibit 3.

Q. How did it happen that the general slant of all these let-ers was on an incline, and "for possession" is writ-en almost perpendicular up and down the page?

A. I don't know how that happened. I wrote it all the same.

Q. You didn't stop to change your position, did you?

A. I don't know whether I did, or not.

Q. What was that conversation in the store when you went into the store to draw up this contract?

A. I brought him the money, and told him there was the other $20, and I said We will go over to the desk and draw up a contract describing the fence and possession.

Then we went back to the desk and I commenced drawing that up and writing out; wrote right along. I think we had a little discussion in regard to interlining, about the Cruickshank part of it. I had got it writ-en up, pretty much all written when Schlosser said we didn't describe the two wires on the part of the fence bordering up to Cruickshank's. I have been acquainted with this land for 20 or 25 years. Have been around there quite a good many times before 1890 hunting and fishing.

Q. What kind of banks are there on the north side of Mud lak[illegible]

A. There is a strip over the county line in which there is a k[illegible] of a ridge. I would not really call it a bank, about 15 or 20 rods long. There is not much of a bank to the rest of Mud lake.

Q. How do you distinguish between Mud lake proper and the balance of the land there?

—. There is a kind of a second bottom, and a hill out north in section 30, probably four rods. There is a kind of a flat about 40 rods when you leave the high land.

132 Q. What is it that distinguishes the line between Mud lake proper and lot 11?

A. Well, there is no lake on the east of the island whatever.

Q. What is there to distinguish between lot 8 and Mud lake proper?

A. There is a kind of a ridge rounding out there, or point of timber; kind of runs out northeast a little.

Q. And the south half of lot 9; what is there to distinguish between that and Mud lake proper?

A. The extension of this island on lot 12 extends out about 40

rods across lot 9, then it runs out into this one again for a ways. It is fair sod. And then it runs into these reeds.

Q. There is a strip of low land between lots 13 and 12, isn't there, according to this blue plat No. 2?

A. Yes, sir.

Q. What is there to distinguish between that low land in the inlet from the bed of the lake proper?

A. There is a little raise out on lot 8 that is a couple of feet higher.

A ridge of earth, vegetation and grass on it, grass and weeds. I testified in the case of Grant and Eaton *vs.* Hemphill.

Q. You testified, didn't you, to-wit: Q. What do you say with reference to the shore of these lakes on the north side being well defined, or not? A. It is pretty well defined with the exception of where the inlet comes in.

A. I answered that question, undoubtedly.

I also testified that I had had business over to Lost Island lake and Mud lake; that I went fishing many times, and that I had went there hunting, and that we generally fished on Trumbull lake and Palo Alto lake. That was the general fishing ground in the spring of the year, the outlet between Trumbull and Mud
133 lake. I said the water on these lakes are about the same now as they have been during ten or twelve years, and my statement in that respect is entitled to as much credit as anything I have sworn to. I testified in the Grant-Eaton case that the banks of Mud lake, or the ridge, was about 17 feet high.

Re-direct examination:

I wrote the contract about the fence, and when I had wrote most of it, Mr. Schlosser called my attention to the two wires on the Cruickshank fence. I stopped and talked it over and said We can interline it. Mr. Schlosser proposed that we either tear it up and write a new one, or interline it; and so we interlined it. We might have stopped and talked about it several times while I was writing it.

Re-cross examination:

I could not say whether I wrote all of it before we stopped and discussed it and interlined it.

Defendants now offer from transcript, Exhibit 36, being a transcript of the testimony in the case of George Schlosser against Wallace Cruickshank in the November term of 1893 of this court, being so much of the testimony of James Spaulding in the cross-examination of James Spaulding on the witness stand, containing pages 71 to 79 inclusive, of said transcript.

Plaintiff objects to the same as incompetent, irrelevant and immaterial, and not tending to impeach the witness; and we object to it unless the whole of his testimony is offered.

EXHIBIT 36.

My name is James Spaulding. Mud lake is shallow. I am acquainted with the south half of section 30, Lost Island township; have known it since 1871. Have seen cattle grazing there.
134 Teams can pass over the cultivated land to the timber beyond. I have seen it when we could walk across there in the summer time. I was there once when one portion of Mud lake was dry. I have seen the portion lying at the south half of 30 dry, completely dry, three or four years ago. I was over it this fall. It is practically dry now. The center of the lake is dry enough so that stock had food in there during that summer, also food on the east. During all the time I have known Mud lake it dries up and fills up just the same.

Defendants, as a part of the re-direct examination of Mr. Hemphill, offers in evidence Exhibit 37, being a copy of a letter under date of February 15th, 1899, addressed to the county auditor, Emmetsberg, signed E. B. Evans, the original of which is now on file with the county auditor.

Plaintiff objects to the letter as irrelevant and immaterial.

EXHIBIT 37.

Letter notifying county that E. B. Evans has sold his interest in the land to Hemphill and directing the county to recognize him.

(Signed) E. B. EVANS.

Defendants offer in evidence Exhibit 39, being a copy of the contract entered into on the 2nd day of May, 1898, between the board of supervisors of Palo Alto county and E. B. Evans.

Plaintiff objects as immaterial and irrelevant, and does not carry and convey any title.

EXHIBIT 39.

Written contract between Palo Alto County and E. B. Evans, authorizing E. B. Evans to represent the county in applying for a survey and selection of swamp land in sections 29 and 30,
135 township 97, range 34, and providing for a compensation for his services of an undivided one-half interest to all swamp lands patented to Palo Alto County.

Defendants offer in evidence Exhibit No. 38, being an assignment of the contract mentioned in Exhibit 39, under date of August 24, 1898, the original of which is on file with the cou-ty auditor of Palo Alto county.

Plaintiff objects as immaterial and irrelevant, and that the same does not carry or convey title.

EXHIBIT 38.

Assignment of contract, Exhibit 39, to W. L. Hemphill, executed by E. B. Evans, directing the county to recognize Hemphill as successor in interest to the interest of E. B. Evans in the swamp lands in sections 29 and 30, township 97, range 34.

(Signed) E. B. EVANS.

Defendant offers in evidence Exhibit No. 40, quit claim deed executed by E. B. Evans and N. E. Evans, his wife, under date of the 23rd of August, 1898.

Plaintiff objects as being immaterial and irrelevant, and does not carry or convey title.

EXHIBIT 40.

Quit claim deed conveying lots 11, 14 and 15, section 30, township 97, range 34, with other lands, to W. L. Hemphill.

(Signed) E. B. EVANS AND WIFE.

Plaintiff offers in evidence from the depositions taken in the case of John D. Eaton *et al.*, *vs.* W. L. Hemphill in the district court of Palo Alto county on the 21st day of August, 1891, the entire cross-examination of said Hemphill, deposition being testified to as Plaintiff's Exhibit P.

Defendants object to the same as being incompetent and
136 immaterial, and for the further reason that the witness, Hemphill, admitted the testimony was given in the cross-examination that was propounded by the attorney for the plaintiff, and that the same does not tend in any manner to impeach his testimony given upon the stand.

EXHIBIT P.

I went fishing on Lost island and Mud lake a good many times. Also went hunting there; could not tell how often hunting; all kinds of game. We generally fished on Trumbull and Palo Alto lake. Generally followed the outlet of Mud lake and fished along there. Also fished in Okoboji lake and Lost Island lake.

Have known the land for ten or twelve years. The water is about the same now as it has been during those ten or twelve years. The north bank of Mud lake is tolerably high. It is about 17 feet above the water, that ridge of land that comes down from the supposed section line. I am talking about the ridge of land that runs up on section 19 and clear across 20. I don't call that the bank of Mud lake. I did not say the bank was 17 feet high; I said this ridge of land was. If I said the bank I meant the ridge. Q. Then we *we* will talk about the shores of Mud lake. What kind of land is there

there? A. Some places, as I said before, it is dry land, and some places it is not. Q. How high is the north shore of Mud lake above the water? A. Well, it varies. Q. From what? A. All the way up to 17 feet. Q. You still say that the shore of Mud lake is 17 feet above the water? A. No, sir; I say the northeast corner of Mud lake is 17 feet above the water. Q. You have reference to the northeast corner as designated on the map? A. Yes, sir; right along there (indicating on plat) that is, I should judge, from ten to fifteen or twenty feet along there.
137 I am referring to the land north of the meander line. South of it is supposed to be lake. It is kind of lowish along here, (indicating on plat); and this here is dry land. Q. When you get on the edge of the lake, how high is the edge of the lake above the water? A. I should judge about five feet right there. It runs about so until you get, I should judge, about 15 rods east. Then it runs down to kind of flat land. I could not say how high the flat land is above the lake. I ran right straight through. There was dry land below there. It was in September of 1890 that I ran through. Q. Immediately northeast of the lake, how does it compare in that day with the level of the lake? A. It is higher than the lake, probably between four and five feet; that is, at the section line. Q. You never saw the waters of Mud lake any higher than they were a year ago? A. I may have seen them a little higher at times, but not much, just about the same. In the spring of the year they might be a little higher.

LEROY GROUT, recalled on behalf of the plaintiff.

As near as I can tell there was a well-defined bank along the north and east portion of the timber point on the west of section 30, but I don't think at any point along there it was very abrupt. I think it is about 30 rods between the bank of the timber point and the bank of the island at the line A A.

Q. Now, you examined Exhibit 21, examined the same point as indicated on that plat. I will ask you whether, when you made that survey, there was any narrow channel there between the same points, that is, A to A, on Exhibit G, as represented on plat 21?

A. At the time I was there I did not notice anything of that nature. It was covered with water and slush ice. I did not observe a narrow strip of dry land as indicated by the black lines.

I meandered along water when I made plat Exhibit G. Some of the time the chain men were in the water. I meandered
138 out on the surface of the end on the south half of section 30; the meander lines and corners as meandered by Barber.

Q. You may state how, and in what respect, the survey of Barber corresponds with the meandering of the survey in 1857, and whether or not any part of the land included in the meander line of the original survey is now included in a portion of the lots platted by Barber?

Objected to as not the best evidence, and as incompetent and not rebuttal.

A. The only way that I can answer that is, that it was impossible to retrace the original Government meander lines, but from an observation and resurvey of the line run by Barber, and by comparing with the original the Government field notes, I should say they do not agree exactly. The starting point to Barber's survey is further east on the line between sections 30 and 31, than the one as indicated on the original survey. The angles are at variance but very little, but the difference between the meander corner and the corner in the bog, is not as much as indicated in the original survey. There is a difference of 3 chains and 8 links. Right north of Schlosser's house I meandered by Barber's runs in the timber, back of Schlosser's house about 50 feet from the bottom of the bank along slough or lake. It runs about 30 rods on the slope of the bank, taking in a part of Schlosser's timber. As near as I could determine when I tried to run the original meander line it would run through the slough quite a ways north of that. My computation of the number of acres left to Mr. Schlosser by Barber's survey would be 98 and 50-100 acres.

Objected to as not the best evidence.

Cross-examination:

139 I made these computations yesterday from the notes I had of Barber's when I run those meanders for Hemphill, and from the distance given on plat Exhibit 2. I started from the meander corner between sections 29 and 30, computed those angles around to the meander corner on the line between 25 and 30, then down from there to the section corner on the southwest of 30, then back to the point of beginning.

Q. Taking the plat, Exhibit 2, state what distance you computed between the south line of section 30, and the irregular meander line along the north of lots 2 and 3, and between sections 29, in township 97, range 34, and section 25, in township 97, range 35?

A. I took those distances as I had them from Barber's report. Those distances are not shown on Exhibit 2. The only distances shown are on the west side and south side of section 30. The distances are shown by the field notes.

The first course I took, starting from the meander corner between sections 30 and 31, was north, 19, ¼; west 18 chains and 30 links; the next course was north 81, ¾ west, running up over this ridge 14 chains and 66 links; the next course was south 21½ degrees west, the next was south 71 degrees west, 7 chains and 80 links, or 514 and 8-19 feet; it was measured with 100 feet steel tape, and is figured by multiplying by 66; the next course was north 39 degrees west, and 15 chains, or 990 feet; this course to here from the edge of the timber up into the slough, as I said, the water was so deep my men located the point there, and then by triangulation I had to determine my line from that. On the first day my men made a

mistake, and I re-run the line, and the next morning determined that he had made a mistake. I then adjusted my instrument on the west shore of the slough to get in line according to direction, on the west shore of the slough that runs down through lot 13, down back by Schlos-er's house. I adjusted myself to that by sighting up, and getting the true angle according to the field notes. I
140 placed myself on line with my instrument, and surveyed the real angle as shown by Barber's notes. I determined that I was at the place that Barber's notes indicated, from the angle from this point, by his angle and measurements. I considered that survey agreed exactly with Barber's survey. I found no discrepancy. I showed same from the scaling, that it was about 30 rods between the points A A on Exhibit G. I would say that the distance from east to west across what is indicated as island at figure 3, would be about 60 rods; from the extreme east point of the island to the east section line of 30 would be about 50 rods; from the west section line on section 30 to a point immediately west of the letter A on the timber point would be about 25 or 30 rods. I don't think there is 20 rods from A to A; plat, Exhibit G, was made in April, 1893. The water was quite high.

Q. At the time you asked Schlosser, after the survey was made, about paying his half, did he say then that he would pay any portion of the help for yourself and men?

A. He said he never agreed to pay anything for the survey; he did not say anything about help. I am sure about that. The written portion of Exhibit 41 is in my handwriting, and that is my signature.

The defendant offers in evidence as part of cross-examination, Exhibit 41.

Plaintiff objects as being incompetent, irrelevant, and immaterial; not cross-examination; the statement made by Mr. Grout would not be binding on Mr. Schlosser.

EXHIBIT 41.

W. L. Hemphill, Ruthven, Iowa:

Mr. Schlosser was here today. He says he never agreed to pay anything toward the survey, except to pay the man he furnished.

Yours respectfully, LEROY GROUT.

141 GEORGE SCHLOSSER, recalled.

I signed Exhibit 3. That portion, "For possession of land and fences," right over my signature, was not there when I signed it; it was not put there with my knowledge and consent; there was no talk between Hemphill and myself prior to signing the instrument, about possession of the land; it was not referred to in any way. Some time in April, Hemphill, his wife and his wife's sister, drove up one Sunday evening, called me out and wanted to buy the fence.

He claimed to me he had a patent on the land. There was nothing said about my giving possession of the land at that time. The fence was on the east line of section 30, between 29 and 30, and another that run from the half section, the northeast corner of the half section of 30, in a northwesterly direction. He came again to see about the fence, and claimed that he had bought the land; wanted to buy the fence, or wanted me to take it out of there. I thought it would be cheaper to sell it and buy new fencing, and put it on where it belonged, on the line.

Q. When the question of title was finally determined, do you mean?

A. Yes, sir.

I studied it over a little while, and I said, if you are a mind to give me $25 for the fence, you can do with it what you like. He said that he would take it, and paid me $5 there; promised to meet me in Ruthven and pay me the other $20. I met him at Furlong & Berg's store. He handed me the $20, then went back to the desk and wrote me out a receipt.

Q. Any discussion about giving up possession of the land, or importing possession?

A. No, sir; there was very little said about it.

I read over the receipt after he had written it. A controversy arose about the Crookshank fence. Crookshank had two wires
142 on there, and I had two. I had no right to sell the other two wires.

Mr. Alex Hemphill, W. L. Hemphill and Richard Ryan drove up one day, back of my barn; Hemphill and his father came over and got to talking fence; wanted to know whether I would put in my share of the fence. I told them whenever we got a final decision on the land, and everything was settled, I was willing to do my part in anything. I put in about 30 rods back of my barn, to get my cows over to my cow yard.

Cross-examination:

He claimed to me that he had bought the title from the county, and that he held a patent on it; Mr. Ryan claimed that he had a patent on his land. That is the way I understood it. I had contested Ryan's entry. I think I was mistaken about the patent; they claimed they had a patent later on; claimed it after they got the decision in Des Moines. Later on he claimed he had a patent. I knew Hemphill was intending to put a fence on the meander line. He spoke to me about it the time he and his father met me on the hill, and that Sunday when he and his wife came he said he wanted to put a fence on the meander line. He spoke about running from the east, right over to the meander corner west, back of my barn, which made about half the distance, and he wanted me to put in the balance. Nothing was said about who should have possession of the land. I have not seen the receipt since it was signed. I know

I would not have signed it if the words possession of the land had been there; I was not selling any possessions. I did not exactly know he was going to take possession. They just stepped right in and took it. I assumed that he was going to take possession.

Q. Now, what is there about that word possession, that you thought showed that it was written afterwards?

143 A. It shows that it was run more straight up and down, and curves over the letter G.

Q. Well, suppose he wrote that first? He would not run it over the letter G then.

A. I mean across the top of it.

Q. Well, suppose that G was not there, then he would not run it over that, would he? Do you see any other words where they run perpendicular in that way? How about that word, "southwest corner?" Does not it run up the same way?

A. All I have got to say is that the words "possession of lands and fences" was not there.

Q. You have seen Exhibit 3; do you remember whether there is any place in that, in the letters in your name, crossing over on the letters that were written by Hemphill?

A. That letter G runs up over the line; the word possession makes a curve up over it.

Q. It runs on the word possession too, does it not?

A. I think it runs close to it.

Q. After looking at the paper is there any other letters of your name that runs over the words that Mr. Hemphill wrote?

Plaintiff objects to the question as not the best evidence.

A. I do not think there is.

Q. Doesn't the letter S run right over the word land?

A. There is no mark of the pen there at all. I don't think it goes over Hemphill's letters.

Defendant offers in evidence, record of Palo Alto county, Book Number Four, Record of Deeds, page 473.

Plaintiff objects as irrelevant, immaterial and incompetent; the book is not produced in court, and that it is not rebuttal.

Book 4, page 473.

(Homestead receipt. See Exhibit D of Richard Ryan's answer.)

144 The defendant offers in evidence, Exhibit 43, being the original homestead receipt, number 1312, issued to Richard T. Ryan, for lots 12 and 13, section 30, township 97, range 34, signed by Stephen J. Loughran.

(See Exhibit D. Defendant Ryan's answer.)

Plaintiff objects as incompetent, irrelevant and immaterial; not rebuttal; the Government had passed title to this land when they issued title to Anthony; whole proceedings were without jurisdiction on the part of the department; wholly void as against the title of plaintiff.

By agreement the case is to be argued, submitted and decree to be rendered in vacation. Argument to be had at such time as the court and parties may agree.

On the 21st day of May, 1900, the following proceedings were had: Pursuant to application filed herein, defendant offers in evidence, Exhibit 44, being a certified copy of swamp land patent from the Government of the United States to the State of Iowa, for lots 11, 14 and 15, Barber's survey being a portion of the land in controversy.

Objected to by the plaintiff as incompetent, irrelevant and immaterial, and that the evidence shows that the land described in the patent was surveyed by the original Government surveyor, who subdivided the township in question, and patent duly issued therefore to parties, from and through whom the plaintiff claims title, and that upon said patent being issued, the Land Department of the Government lost the jurisdiction and power to interfere with the title which passed by virtue of said patent; that patent Exhibit 44 is void, illegal, unauthorized, and passes no title.

EXHIBIT 44.

United States of America, to the State of Iowa, conveying lots 12 and 13, of section 29, and lots 4, 7, 8, 9, 10, 11, 14 and
145 15 of section 30, township 97, range 34, containing in all, 298 acres and 29-100 of an acre, executed on the 18th day of April, 1900, by President William McKinley, F. M. McKean, sec'y, C. H. Brush, recorder of the General Land Office. Certified to as a true copy of the original on file in his office, by G. L. Dobson, secretary of state.

Defendant offers in evidence, Exhibit 45, being swamp land patent executed by the governor of the State of Iowa, to Palo Alto county. Plaintiff makes the same objection to Exhibit 45 that was made to Exhibit 44.

EXHIBIT 45.

Patent from the State of Iowa to Palo Alto county, conveying the same as Exhibit 44; executed on the 24th day of April, 1900. Signed, Leslie M. Shaw, governor; G. L. Dobson, secretary of state.

On the 10th day of August, 1900, the court rendered the following:

Decree.

And now, to-wit: on the 10th day of August, 1900, the court having considered the evidence and proofs offered, and being fully advised in the premises, it is ordered, adjudged, and decreed by the court that the issues are found for the plaintiff, and that plaintiff is entitled to the relief demanded in his petition; is the absolute and

unqualified owner in fee simple of lots 2 and 3, section 30, township 97, range 34, including all the land lying between the Government meander lines, and the high water mark of a certain body of water known as Mud lake, as well as the land lying between said meander line and the half section line of said section 30, except the land lying under the high water mark, and being covered by the waters of said lake. He is hereby entitled to immediate possession of said premises, and that a writ of removal issue to remove defendant from the possession of said land.

146 It is further decreed that the absolute title in fee simple in and to said premises be and the same is hereby established and quieted in the plaintiff, as an absolute indefeasible fee simple title, and the defendants are hereby estopped from having or claiming any right, title, interest or estate, in said premises, and they are perpetually enjoined from occupying or using said premises. Defendants except.

W. B. QUARTON, *Judge.*

Thereafter, and within the time provided by law, to-wit: on the 6th day of October, 1900, the defendants duly perfected their appeal from the judgment and decree, and other orders and rulings of the court and served upon the attorneys for the plaintiff, and upon the clerk of the district court of Palo Alto county notice of appeal in due form, and filed the same with the clerk of the district court of Palo Alto county, and secured to said clerk his fee for transcript of record, in manner provided by law.

Attorneys' Statement.

The foregoing is a full and complete abstract of the pleadings, record and evidence in the said case, and of the trial thereof in the district court, and contains all the evidence offered or introduced upon the trial, and the exceptions and objections taken, and all the orders and proceedings of said case, and the decree and judgment of the court.

E. B. EVANS AND
MORLING & DAVIDSON,
Attorneys for the Plaintiff.

Notice.

The defendants will ask to be heard in oral argument in the supreme court.

E. B. EVANS AND
MORLING & DAVIDSON,
Attorneys for the Plaintiff.

147 *Cost of Printing.*

I hereby certify the cost of printing the foregoing abstract was $139.75.

E. B. EVANS.

148 In the Supreme Court of Iowa, January Term, A. D. 1901.

GEORGE SCHLOSSER, Appellee,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO County, Iowa, Appellants. } In Equity.

Appeal from Palo Alto district court—Hon. W. B. Quarton, judge.

Buck & Kirkpatrick and Carr & Parker, for plaintiff and appellee.

E. B. Evans and Morling & Davidson, for defendants and appellants.

Appellants' Additional Abstract of Record.

The appellants file the following amendment to and additional abstract setting forth some matters that were omitted in the former abstract:

On the 11th day of April, 1900, defendants filed the following

Amendment to Their Answer.

149 Further answering, these defendants say that under and by virtue of the laws of Congress of the United States, these defendants are the owners of the land in controversy herein, and that they claim the ownership and the right to possession by virtue of the acts of Congress, and that prior to the several acts of the Land Department of the United States, in the answer of the defendants herein referred to, the said lands were the public lands of the United States, and the State of Iowa had no jurisdiction thereof, and its courts and laws had no jurisdiction or authority thereover, and that only the courts and the Land Department of the United States *has* jurisdiction of this controversy.

(For reply see pages 12, 13 and 14, appellants' abstract.)

Plaintiff offers in evidence Exhibits H to O, inclusive.

Objected — as not having been properly identified, and irrelevant and immaterial.

150

EXHIBIT I.

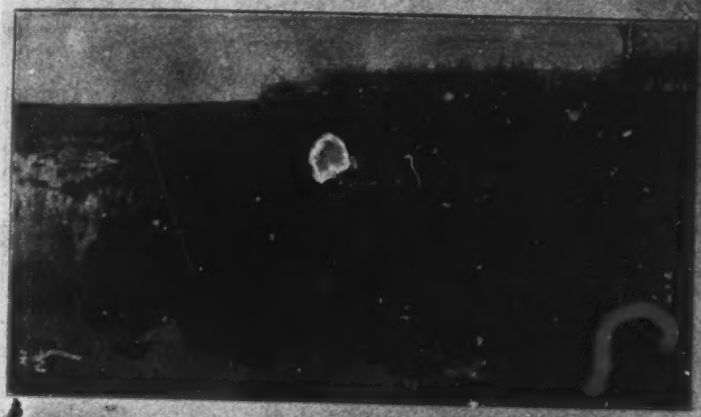
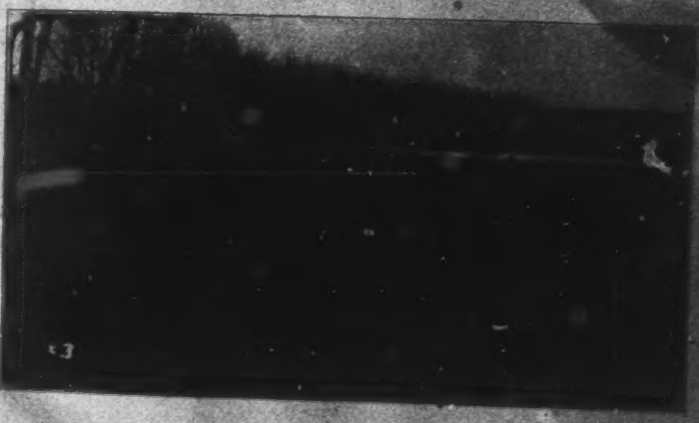
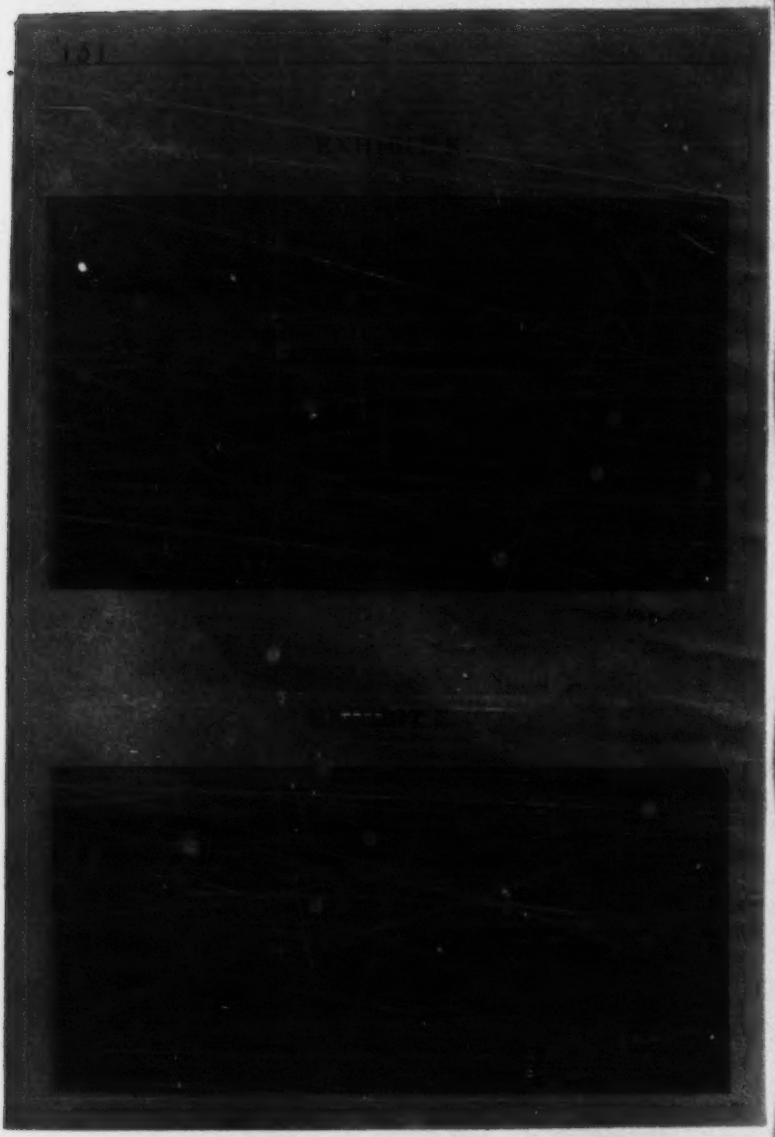
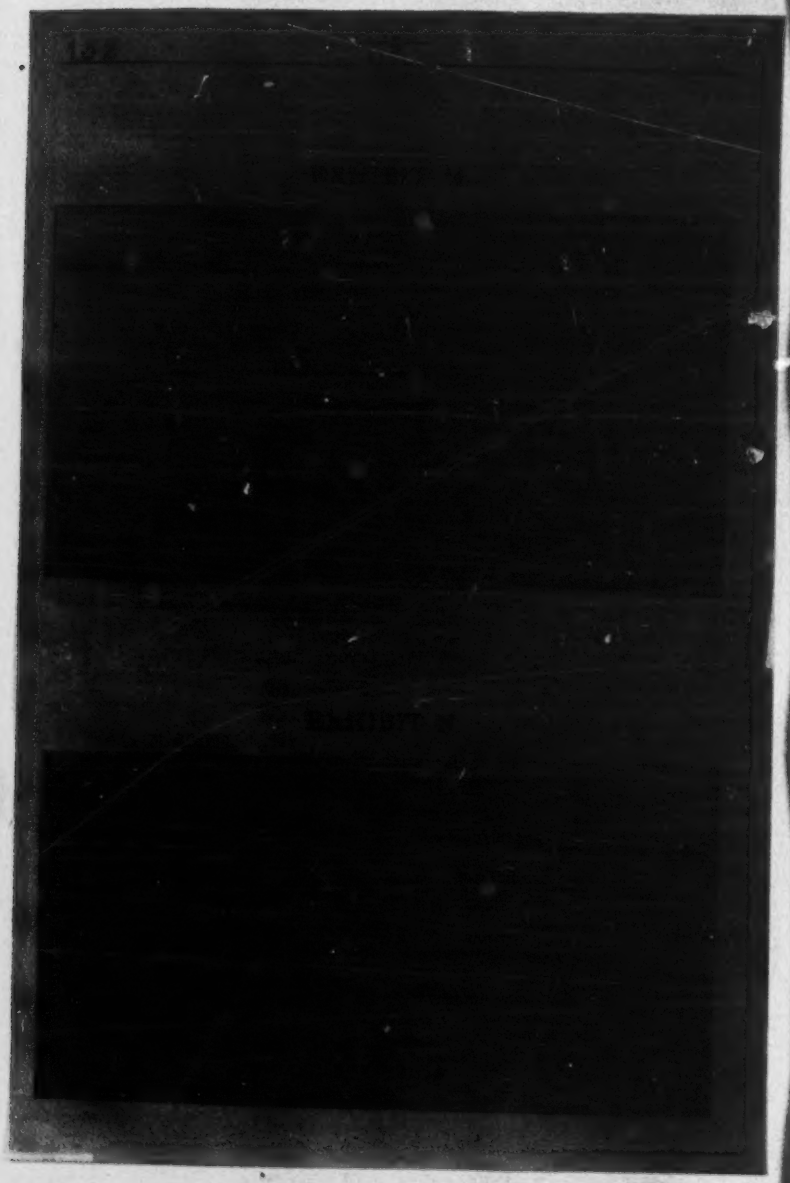


EXHIBIT J.

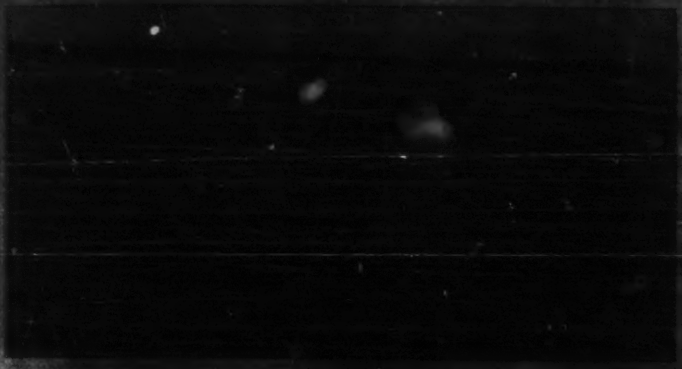






153

EXHIBIT O.



(See appellant's abstract, pages 30, 31 and 32.)

Defendants offer in evidence Exhibits Nos. 1 and 5 to 20, inclusive, together with letters A to P, inclusive, placed upon the margin of said photograph Exhibits, with the corresponding letters on the plat Exhibit No. 4.

Objected to as incompetent, irrelevant and immaterial.

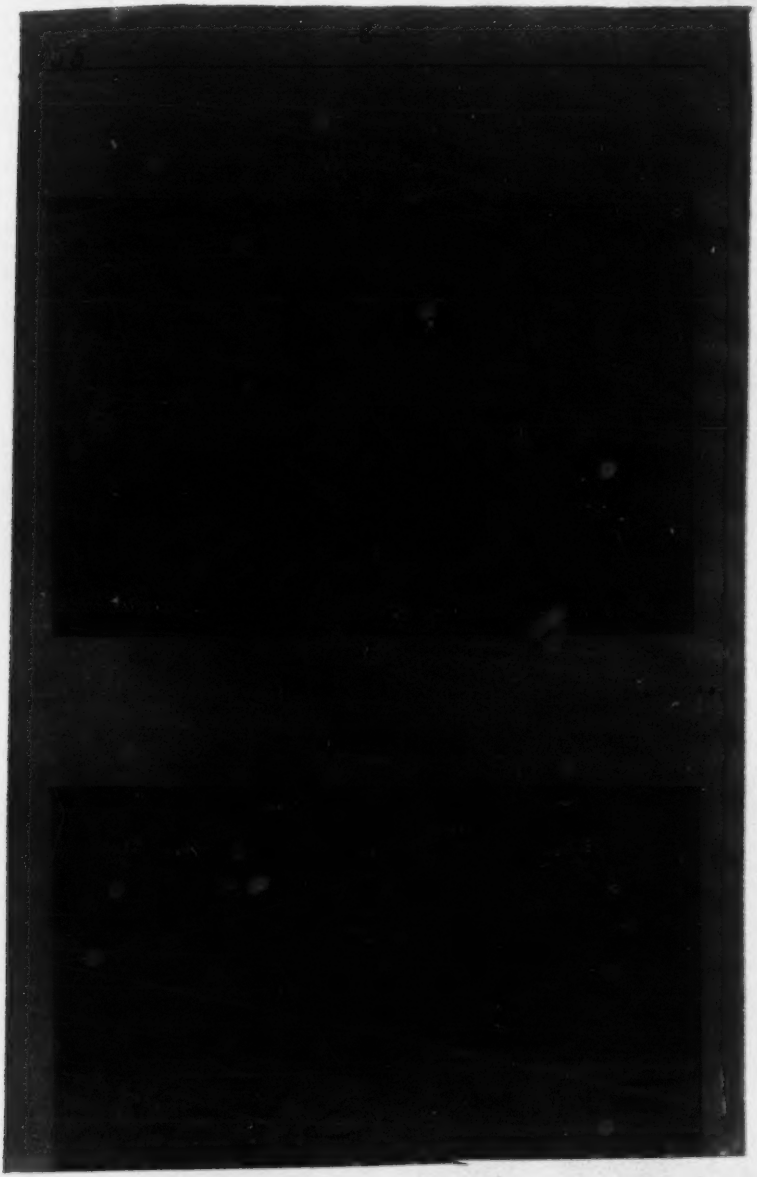
(See appellant's abstract, pages 58 to 61, inclusive).

EXHIBIT No. 1.

154

EXHIBIT No. 5

EXHIBIT No. 6



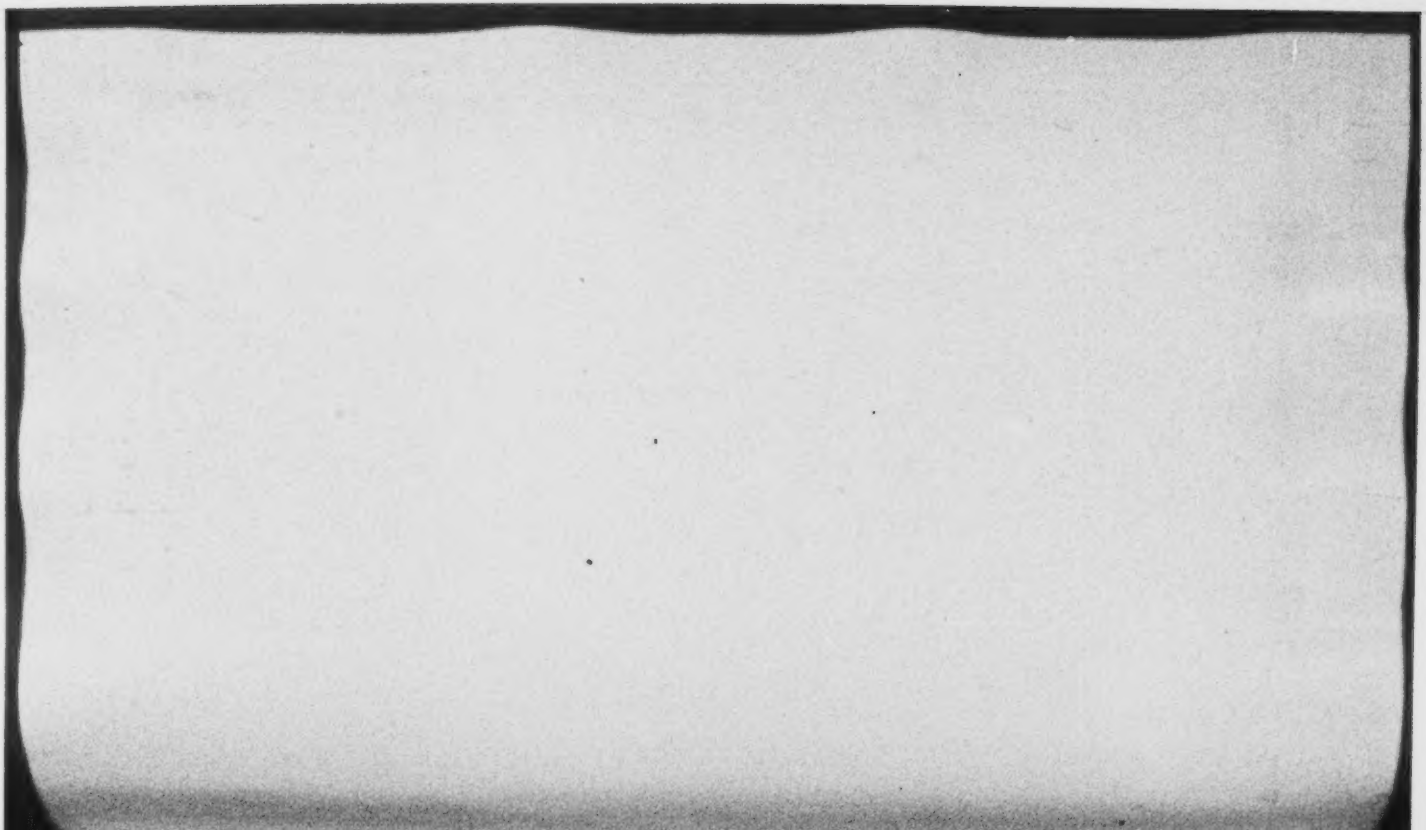
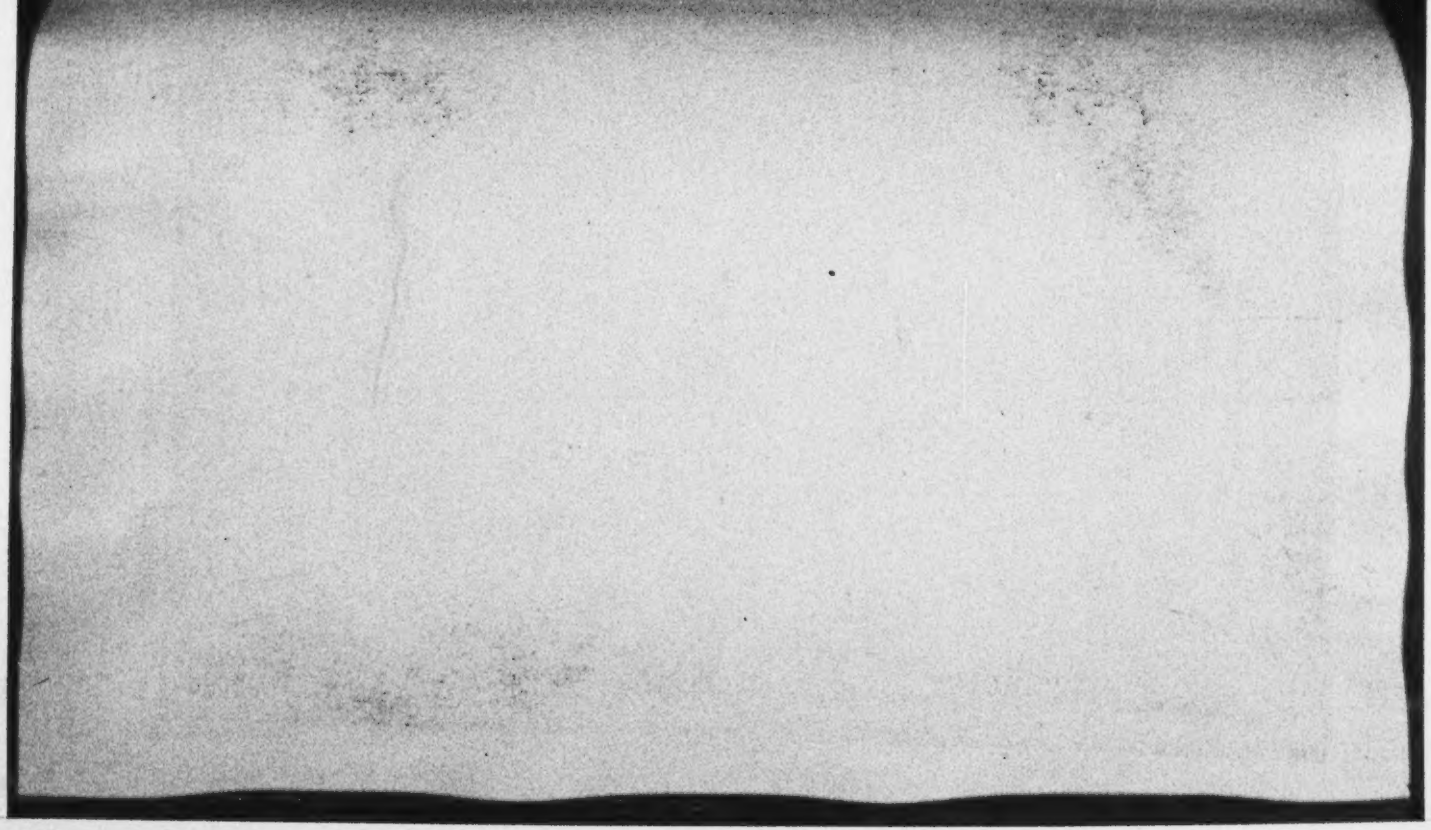
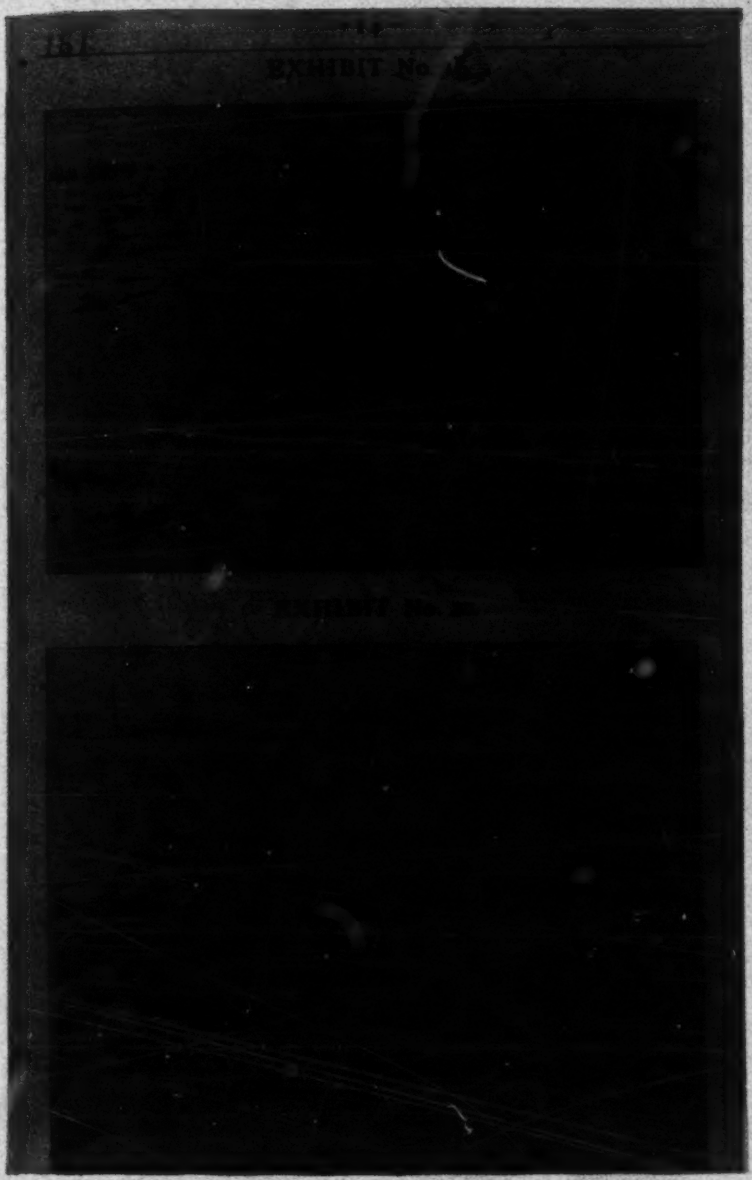


EXHIBIT No. 17

EXHIBIT No. 18





162 *Attorneys' Statement.*

The foregoing amended abstract, together with appellants' abstract, heretofore filed, is a full and complete abstract of the pleadings, record and evidence in the said case, and of the trial thereof in the district court, and contains all the evidence offered or introduced upon the trial, and the exceptions and objections taken, and all the orders and proceedings in said case, and the decree and judgment of the court.

E. B. EVANS AND
MORLING & DAVIDSON,
Attorneys for Appellants and Defendants.

The signature to attorneys' statement, and to notice of oral argument in appellants' abstract should be, and is hereby corrected to read: "E. B. Evans and Morling & Davidson, attorneys for appellants and defendants."

E. B. EVANS AND
MORLING & DAVIDSON,
Attorneys for Appellants and Defendants.

163 In the Supreme Court of Iowa, January Term, 1901.

GEORGE SCHLOSSER, Appellee,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO County, Iowa, Appellants. } In Equity.

Appeal from Palo Alto district court—Hon. W. B. Quarton, judge.

Buck & Kirkpatrick, and Carr & Parker, for plaintiff and appellee.

E. B. Evans and Morling & Davidson, for defendants and appellants.

Appellee's Abstract of Record.

The appellee, deeming the abstract of appellants incomplete and incorrect, deny- the correctness thereof and set- out the following record in addition thereto and in correction thereof.

In the abstract of the reply to the answer of Richard Ryan, the word "denies" being the second word in the second line of page 10, should be changed to the word "admits" so that the same will read, "Plaintiff admits that defendant went into possession of a portion of the land, etc."

164 The word "denies" in the fourth line on page 10 should be changed to "admits."

After the word "entry" in the twelvth line on page 10 the following clause should be added: "than to hold the title to the land against divers squatters who were taking possession and claiming title to same as Government land."

After the word "herein" in the last line of said abstract of reply, on page 10, the following paragraph should be added: "This reply is made to stand to the amendment of Richard Ryan this day filed, and plaintiff makes the same reply to said amendment as this day made to amendment of W. L. Hemphill."

After the word "county" in the eleventh line of the reply to W. L. Hemphill *et al.* on page 13 the following should be inserted: "But plaintiff avers that he made said application under advice of counsel that it would not effect his legal rights to the title obtained by virtue of the patent of Anthony, and that it would be cheaper to make entry thereof under the claimed re-survey than it would be to fight the several squatters who were at different times settling on the land and claiming it to be Government land, and he at no time abandoned or relinquished his title obtained through said patent."

Neither Exhibits "B," "C" or "D" describe or name the number of acres conveyed as shown in Exhibit "A," on page 15 of abstract, and said exhibits make no reference to the number of acres.

After the statement as to a sand bank by the witness Schlosser in first and second lines of page 19, is the following question and answer: "Q." "Could you tell from observing the sand bank whether it had been thrown up there by the action of the water, or was there a natural division between them."

"The defendant objects to the question asked as calling for the conclusion of the witness, and the witness not showing himself competent to express an opinion. "A." "I should say that it was done by the action of the water."

The word "northwest" in the direct examination of the witness M. S. Green in the 16th line on page 21 should be "southwest."

The word "water" in the first line on page 22 was evidently intended as "beach" and is apparently a mistake of the wit-
165 ness Green or reporter. The questions and answers in connection therewith are as follows:

Q. "But as indicated there, as the water was in former times, about how wide would the beach be?"

A. "I think there was a time when there was no water there."

"The defendants move to strike out the answer of the witness as being a conclusion of the witness and not based upon any actual knowledge."

Q. "Is there a highway there at that point you call a beach?"

A. "Yes sir."

In the next to the last paragraph on page 24 in the direct examination of James Spaulding, after the word "through" in the sixth line, the following should be inserted:

Q. "Do you remember Mr. Anthony's occupying this place?"

A. "Yes sir." He claimed to own the island over across here."

"Defendants moves to strike out the answer of the witness as being incompetent and immaterial."

"I was told that he sold timber from there."

Q. "What about Mr. Ant-ony, did he occupy and have possession of this point at the west of this half section."

A. "He claimed it, yes sir."

"The defendants objects to the question asked as irrelevant and immaterial."

"The timber on the point was smaller. On the island there was walnut, ash and oak, and I think ash and oak on the point."

Pursuant to offer of plaintiff of the Government field notes at bottom of page 24 of abstract, the plaintiff offers the following meander notes, taken from page 317 of the record:

Commencing at meander post on west boundary in township 97 north, range 34 west, running east.

13 In section 30.
N. 70 E. 11.00 var. east.
S. 80 E. 14.00.
S. 40 E. 15.00.
N. 70½ E. 8.00.
N. 22½ E. 12.00.
166 S. 82 E. 15.00.
S. 20 E. 18.50 intersected line between section 30 and 31 at
14 post.

In the fourth line of page 28 in the cross examination of James Spaulding the word "southwest" should be changed to "south and west" to conform to the evidence.

In the seventh and eight- lines of the cross examination of James Spaulding on page 28, the abstract incorrectly recites: "The part of the plat marked lake southwest of the island was used as pasture in 1871." The evidence is as follows:

Q. "And, the land on the south half of section 30 was used for pasture at that time, was it not, Mr. Spaulding?"

A. "On the west end, not on the east."

Q. "Well, that was this land up in here that is marked lake, was it not?"

A. "South of the point."

Q. "South of the point."

A. "Yes sir, and this answered for fence here."

Q. "That is all between the island and the point, so called?"

A. "Yes sir."

Q. "So that this part that is marked lake on this plat, southwest of the island, so called, was then used as pasture, when you came to this country in 1871?"

A. "I think so."

Examination by Mr. A. C. PARKER:

Q. "I understood you to say that this part here answered as a fence?"

A. "I did."

Examination by Mr. E. A. MORLING:

Q. "He said that this in here answered as a fence?"
A. "No sir, that."
Q. "Can you just make a sort of mark there where you say the fence was, where you think the fence was?"
A. "There was no fence on that side; the fence was on the south and run over to the lake, over to Mud lake, and down to this, was all the fence I knew of?
Q. "So you could not be positive whether this land where you have made the cross, southwest of the island here was not used
167 as pasture and actually pastured in 1871, could you?"
A. "I don't remember whether there was any fence east of that or not, but I know that this water answered as a fence."
Q. "But, you could not be sure whether that water that answered as a fence was up on the north part of the section, or on the south part?"
A. "It run up here next to Schlosser's house."

At the end of the re-direct examination of James Spaulding on page 29 is the following sentence. "The outlet of the spring is in the lake." This, to conform to the evidence, should be "The outlet of the springs is the lake."

The word land in the thirteenth line on page 30 in the direct examination of Francis Fitzgerald should be changed to "island" so as to read "between the island and Schlosser's land."

After the first question and answer of the cross-examination of Fitzgerald on page 31 was the following evidence:

Q. "Which year was it you was there?"
A. "I think I came there in 1871."
Q. "Do you remember whether that year was a dry year?"
A. "I think it was a kind of average year."
Q. "Do you remember whether any part of this marsh was dry so it could be traveled over that year.
A. "I think not."
Q. "Do you remember years during the early part of the time that you were there when you could travel over on dry land from the high land, over across what is marked as wet land, over to the island?"
A. "I think it could not be traveled any of those years in the summer time" "Except the year I have reference to, about seven years ago."

I don't remember before 1891 that there were years when that was partially dried up.

In the said cross-examination at about the middle of page 31 the following evidence should be included in the abstract:

Q. "That is true of a greater part of what is known as Mud lake, it goes gradually into a marsh, instead of having any well defined bank?"

A. "Well no, there is a good big part of it has a well defined
168 bank, probably two-thirds of it, maybe not that much: I can't tell, I never measured it."

In the eighth line of page 32 of the cross-examination of Fitzgerald is the sentence "The entire bed of Mud lake was dry up to seven or eight years ago."

The same should be corrected to conform to the evidence to read as follows: I think the entire bed of Mud lake was dry seven or eight years ago.

At the top of page 34 of the direct examination of Nicholas Rice the following evidence should be included in the abstract.

Q. "Have you observed the lay of the land immediately south and north of the southeast corner of section 30?"

A. "Yes sir."

There is a divide between the swamp land or lake, Mud lake, at that point and Lost Island lake, about 10 or 12 rods wide. The character of the divide is sand and no sod. To the north of the bar is a boggy marsh which is continuous up to the sand bar, and to the south is Lost Island lake which comes right up to the sand. The length of the bar is about 80 rods and during the whole length of it Lost Island lake comes along here, and the marsh extends during the full extent of the 80 rods on the north.

In the third line of page 37 of abstract of the re-direct examination of the witness Rice the word "this" should be changed to "these" so that the sentence reads: The water from these springs run- into the lake.

After the sentence, "I got wood off the island in 1870," in the direct examination of Mr. Crookshank, at about the middle of page 38, the following evidence should be included.

"I bought five trees on the island." * * * "Mr. Anthony had sold them."

At commencement of re-direct examination of John T. Crookshank on page 45 the following evidence should be included:

I would say that the sand ridge has widened about two rods. In my judgment the ice shoved up to the bank like, shoving up a lot of sand, and the wind, has caused it to widen.

After the cross examination of Mr. Hanson on page 46 the following evidence was brought out on re-direct examination:

169 Q. "Do you know of any inlet coming into Mud lake from the northeast."

A. "Yes sir."

Q. Do you know what extent of country it drains in there?"

A. "It drains into what they call Twelve Mile lake, I think 7 or 8 miles to the northeast."

I have been there but I could not tell how large a body of water Twelve Mile lake is. I could not say that it is the outlet of that lake that runs into the inlet to Mud lake. I know it did drain from up that way

At the close of the cross-examination of Mr. Oliver on page 48

after the word "shallow" in the second line is the following evidence:

Q. "It was very shallow you think?"

A. "At that particular part I consider it shallow, because I could see grass growing up that fall."

The following evidence of the witness Schlosser has been omitted by appellant at page 49.

Q. "Now, is this portion that is marked lake or swamp land, does that extend down to the lake shore of Lost Island lake. If not, how near does it approach it at the nearest point?"

A. "It comes within about ten rods."

About half way from my house, along here, there is a strip of trees, and the balance of of the way down clean past the section corner is nothing but sand with no sod only on the side next to the marsh on the north and no trees down there about the narrow point.

The last two lines of the direct examination of Mr. Schlosser as shown by abstract on page 49 are incorrect.

The word "raised" in the next to the last line should be changed to "runs" and the word "to" in the last line should be changed to "by" and the following words of the answer of Mr. Schlosser should be added: "It runs on the south half in here." The same being in answer to the following question: "The lake proper, does it come on the south half of the section, or is it on the north half?"

The word "flax," being the last word in the second line on page 50 should be changed to "fields." And the following is a part of the examination with reference thereto:

Q. "Aside from the pond holes marked five and six, your
170 cattle pastured all over the south half of the section in 1892, did they?"

A. "Yes sir, mostly all over it."

Q. Mostly, did they all over it?"

A. Yes sir, I think they did." Mostly in the latter part of the fall."

Q. "Did they in the early part of the season?"

A. "No there was more or less water along in the spring, and then it receded back."

The sentence "I have pastured it every year" in the tenth line on page 50 should be qualified. The evidence is as follows:

Q. "You have pastured it every year, have you?

A. "Yes sir."

Q. "Every year you have been there except the first?"

A. "Yes sir, when ever the stock would go on it."

The sentence in the fourth and fifth lines of cross examination of Mr. Schlosser on page 51, as follows: "I am claiming the whole half section on the strength of having 99.80 acres" is incorrect, and the witness did not so testify. It appears to be the testimony of the examiner.

The word "SWAMP" as written in Exhibit 4 as shown on page

58 is not shown on the exhibit in evidence of which this is intended to be a copy.

After the word "plat" in the eighth line of page 60 is the following evidence of the witness Wilcox.

"I was turned around there; I didn't have the directions right."

After the evidence as to No. 15 on page 61 is the following testimony of the witness P. M. Moore: No. 16, I don't know. No. 17 may be the house upon the island. No. 18, I don't know. No. 19, I only know that there was scenery that would make such a picture as that, but I would not say that I saw it taken. No. 20, don't know.

The answer to the question propounded to the witness J. T. Painter, near the middle of page 83, "You do not understand from that survey that there was not a lake there when they were surveying that, do you?" was not "Yes sir." * * * as stated in the abstract. The answer was "It says there was a lake there"

After the figures "$20," in the ninth line on page 101 of
171 the direct examination of Alex Hemphill is the following evidence omitted from abstract:

Q. "What did Mr. Schlosser ask for the fence?"

A. "Why, their talk was there, he paid him $20, and he had paid him $5 before in the pasture, or something, that is the way they talked, and that made $25. He handed him the $20 and said this was for the balance."

He said this was for the balance on the fence, and they went back then, after the $20 was handed him for the fence, they went to the back part of the room to write out a receipt.

At the last part of the cross-examination of Mr. Davis on page 1 6 of abstract is the following evidence omitted:

Q. "Where does Mud lake empty into, what lake?"

A. "Into Swan lake, somewheres there—I will be blamed if I know."

The outlet is on the south side if I remember right. I get turned around up in that country amongst those lakes and islands, anyway. I quit freighting around that lake after they got the railroad into Spencer in 1878. I have not been on the south side of the lake since 1878 until the other day; there has been a great change since I came through in the country there.

The objection to Defendants' Exhibit "2" is not correctly shown on the bottom of page 109. The abstract should also state that said exhibit is objected to as incompetent and secondary evidence, and not properly certified; also the words "only a point" in the fifth line thereof should be changed to "incompetent," and the word "wade" in the fourth line from the bottom should be "made" in order to conform to the transcript.

The figures "29" in the objection on page 116, near the bottom of the page, should be changed to "30," so that the same will read Plaintiff objects to Exhibits Nos. "22" to "30," inclusive, etc.

After this objection and before the words "Exhibit 32" on page 117, the following agreement should be noted:

"It is agreed that the plaintiff may object after the record of the offer as to Exhibits "32" and to "34" is made."

172 After the word "evidence" in the top line of page 119 the following word and figures should be introduced: "Exhibit 34," so that said line will read, "Defendants offer in evidence Exhibit 34," etc.

Also the objection following said offer of Exhibit "34" is incorrectly set out and should recite as follows:

The plaintiff objects to each of said Exhibits "32" to "34" inclusive: and makes the objection to each separately, the same as to Exhibit No. "2" and to each of the Exhibits "22" to "30," inclusive.

After the words "pay me the other $20," in the direct examination of the witness Schlosser in the eighth line from the bottom on page 141 is the following evidence omitted from abstract: "Q." "At that time when we paid you the $5, was there anything said about writing up a contract, or a receipt, or anything?"

"A." "I don't remember of anything being said there at all."

Q. "Anything said about possession of the land?"

A. "No sir."

After the word "patent" in the seventh line of the cross examination of Mr. Schlosser on page 142, the following evidence should be inserted:

Q. "Is any of this fence that you sold to Hemphill on the south half of section 30?"

A. "No sir."

A part of the fence was on section 29 according to Barber's lines, and run north to the half section line, and then over on the north half it run in a northwesterly direction until it struck the inlet, then it turned in a southwesterly direction and run down the channel of the lake out into the lake.

Before the question at the bottom of page 142 there was the following evidence omitted from the abstract:

"Q." "When that receipt was shown to you, wasn't your attention called to the fact that the word possession in the last line of the receipt runs up over the 'G'?"

A. "No sir."

I noticed it myself, and I also noticed these letters here, they didn't run in the same angle with these others, those run more straighter up and down than the others does. When I read the

173 receipt and come down to the words "For possession of land and fences," I know that was not in there when I signed that paper. I would not have signed it if it had been there, and I would not be apt to sell about 800 pounds of wire for $25 and throw my possession in.

We, Buck & Kirkpatrick and Carr & Parker hereby certify that the foregoing is a true and correct abstract of the record and evidence offered on trial of said cause so far as the same purports to set out the record, and the same is correctly set out therein.

BUCK & KIRKPATRICK AND
CARR & PARKER,
Attorneys for Appellee.

Cost of Printing.

We hereby certify the cost of printing the foregoing abstract was $12.

BUCK & KIRKPATRICK.

174 In the Supreme Court of Iowa, January Term, 1901.

GEORGE SCHLOSSER, Appellee,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO County, Iowa, Appellants. } In Equity.

Appeal from Palo Alto district court—Hon. W. B. Quarton, judge.

Buck & Kirkpatrick, and Carr & Parker, for plaintiff and appellee.
E. B. Evans and Morling & Davidson, for defendants and appellants.

Appellee's Amendment to Abstract of Record.

The appellee deeming the abstracts of appellan-t and appellee, heretofore filed, incomplete and insufficient for a full understanding of the questions presented to the court for decision, sets out the following abstract of record in addition thereto and by way of amendment thereof.

A true and correct copy of Exhibit A referred to in appellants' abstract on page 15, is in words and figures as follows towit:

175 U. S. to John A. Anthony. Filed April 13, 1875, at 8 a. m.

Homestead Certificate No. 1136, *Application* 1686.

The United States of America to all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Sioux City, Iowa, whereby it appears that pursuant to the act of Congress approved 20th May 1862, "to secure homesteads to actual

settlers on the public domain," and the acts supplemental thereto, the claim of John A. Anthony has been established and duly consummated in conformity to law for the

Lots numbered two and three of section thirty, in township ninety-seven of range thirty-four in the district of lands subject to sale at Sioux City, Iowa, containing ninety-nine acres and eighty hundredths of an acre (excess paid as per receiver's receipt No. 2213) according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general.

Now know ye, that there is therefore granted by the United States unto the said John A. Anthony the tract of land above described.

To have and to hold the said tract of land with the appurtenances thereof, unto the said John A. Anthony and to his heirs and assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the tenth day of October in the year of our Lord one thousand eight hundred and seventy-four and of the Independence of the United States the ninety-ninth.

By the President,

[United States General Land Office.]

U. S. GRANT,
By S. D. WILLIAMSON, *Secretary.*

Recorded vol. 3, page 111.

L. K. LIPPINCOTT,
Recorder of the General Land Office.

STATE OF IOWA, } ss:
Palo Alto County, }

I, Lewis Stuehmer, recorder of said county, do hereby certify
176 that the foregoing is a full, true and correct copy of a patent as it appears in Deed Record "H" on page 89, in my office. Witness my hand, this 25th day of April A. D. 1893.

LEWIS STUEHMER,
Recorder of Palo Alto County, Iowa.

Pursuant to offer of the Government field notes as noted at the bottom of page 24 of appellants' abstract, the appellee calls attention to the following notes of survey on township line between section 25–97–35 in Clay county and section 30–97–34 in Palo Alto county and as affecting the west line of said section 30, same appearing on page 368 of field notes record, and said survey bearing date of July 27, 1855.

"North between sections 25 and 30, var. 11° 45′ E.
16.43 Set meander post on south side of lake.
Lake bears N. E. and S. W., made mound of earth and sod pit 8 links south.
59.31 Set meander post on north side of lake.
Made mound of earth and sod pit 8 links N. of post.
80.00 Set post corner to section 19, 24, 25 and 30.
Made mound of earth and sod pit 8 links south of post. Corner in swamp.
Swamp from corner bears E. and W.
Prairie level soil 1st rate, growth grass and weeds."

Plaintiff also calls attention to the following notes of survey of subdivision of township 97 range 34 west of 5th P. M. commenced July 25th 1857, completed July 31, 1857, as found on page 312 of the record of field notes.

"West random between sections 30 and 31 var. E. 10° 53′.
74.92 Length of line between sections 30 and 31.
East corrected between sections 30 and 31 var. E. 10° 44′.
37.40 Scattering timber bears N. and S.
34.92 Set a quarter section post.
Bearings: Bur O. 10 S. 63 W. 36
Do. 10 N. 53 W. 46
45.00 Leave timber bears N. and S.
64.42 Lake marsh. Set a meander post in mound of turf, pit E. 8 links.
74.92 Section corner.
Surface level, soil 3d rate timber oak.

The record of field notes from which the foregoing selections are taken appears to be duly certified by the register of the land
177 office as a true and correct copy of the original field notes of the Government survey, which certificate bears date of April 21, 1873, and said record filed in the office of the auditor of Palo Alto county, Iowa, Jan. 6, 1874.

We, Buck & Kirkpatrick and Carr & Parker hereby certify that the foregoing is a true and correct abstract of the record and evidence offered on trial of said cause so for as the same purports to set out the record, and the same is correctly set out therein.

BUCK & KIRKPATRICK AND
CARR & PARKER,
Attorneys for Appellee.

Cost of Printing.

We hereby certify the cost of printing the foregoing abstract was $4.

BUCK & KIRKPATRICK.

178 *Appeal Bond to Supreme Court.*

In the Sup. Court of Iowa.

GEORGE SCHLOSSER
vs.
W. L. HEMPHILL, RICHARD RYAN & PALO ALTO CO., IOWA. } —— Term, 189-.

Know all men by these presents, that we George Schlosser as principal, and G. W. McDonald and Joseph Hanson as surety-, are held and firmly bound unto W. L. Hemphill, Richard Ryan & Palo Alto Co., Iowa, in the penal sum of one thousand ($1,000) dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, executors and assigns, firmly by these presents.

Dated this 9th day of December A. D. 1903.

The condition of this bond is such, that whereas the said George Schlosser has sued out a writ of error from the supreme court of the State of Iowa, to the Sup. Court of the United States from the judgment or order of the supreme court of the State of Iowa, made at the May term of said court June 3, A. D. 1902 in a certain cause in said court wher-in George Schlosser is plaintiff, and W. L. Hemphill Richard Ryan & Palo Alto Co. Iowa *is* defendant-.

Now, if the said George Schlosser shall pay all costs and damages that shall be adjudged against him and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered, by the Supreme Court of the U. S., not exceeding in amount or value the original judgment or order, and all rents or hire, or damages to the property during the pendancy of the appeal and prosecute his said writ of error with effect, and if it shall fail to make its plea good he shall answer all damages & costs, then this obligation to be void, otherwise to be and remain in full force.

GEO. SCHLOSSER, *Principal.*
G. W. McDONALD, *Surety.*
JOSEPH HANSON, *Surety.*

—— ——,
District Court.

179 [Endorsed:] No.—. Appeal bond. —— —— *vs.* —— ——.
The within and foregoing bond filed, accepted and approved by me this 11th day of December 1903 Charles A. Bishop, chief justice supreme court of Iowa. Filed Dec. 11 1903 Jno. C. Crockett clerk supreme court. Dec. 11th 1903 Approved this 11th day of Dec. 1903 Jno. C. Crockett clerk supreme court.

STATE OF IOWA, }
Palo Alto County, } ss:

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of two thousand & no dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of one thousand & no dollars.

G. W. McDONALD.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of two thousand & no dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of one thousand & no dollars.

JOSEPH HANSON.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of — dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of — dollars.

—— ——.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of — dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of — dollars.

—— ——.

Sworn to before me, and subscribed in my presence by the said G. W. McDonald and Joseph Hanson this 8th day of Dec. A. D. 1903.

[Notarial Seal of J. H. Thatcher, Palo Alto County, Iowa.]

J. H. THATCHER,
Notary Public.

STATE OF IOWA, }
Palo Alto County, } ss:

I, D. A. Johnson, clerk of the district court within and for said county and State, do hereby certify that I know the sureties within named and am acquainted with their financial ability, and that if the within bond were presented to me for approval I would have no hesitancy in approving the same.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Emmetsburg on this 9 day of December, 1903.

[Seal of the District Court of Palo Alto County, Iowa.]

D. A. JOHNSON,
Clerk of the District Court of Palo Alto County, Iowa.

180 STATE OF IOWA, } ss:
Palo Alto County, }

I, do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of two thousand and no dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of one thousand and no dollars.

G. W. McDONALD.

I do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of two thousand & no dollars beyond the amount of my debts, and have property liable to execution in this State equal to the sum of one thousand & no dollars.

JOSEPH HANSON.

Sworn to before me, and subscribed in my presence by the said G. W. McDonald and Joseph Hanson this 8th day of December A. D. 1903.

J. H. THATCHER,
Notary Public.

STATE OF IOWA, } ss:
Palo Alto County, }

I, D. A. Johnson, clerk of the district court within and for said county and State, do hereby certify that I know the sureties within named and am acquainted with their financial ability, and that if the within bond were presented to me for approval I would have no hesitancy in approving the same.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Emmetsburg on this 9th day of December, 1903.

D. A. JOHNSON,
Clerk District Court of Palo Alto County, Iowa.

The within and foregoing bond filed, accepted and approved by me this 11th day of December 1903.

CHAS. A. BISHOP,
Chief Justice Supreme Court of Iowa.

Approved this 11th day of Dec. 1903.
Filed " " " " "

JNO. C. CROCKETT,
Clerk Supreme Court.

181 In the Supreme Court of Iowa.

GEORGE SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO COUNTY, IOWA, Defendants in Error.

Geo. E. Clarke, attorney for plaintiff in error.
E. B. Evans and A. E. Morling, attorneys for defendants in error.

To W. L. Hemphill, Richard Ryan, and Palo Alto County, Iowa, and E. B. Evans and A. E. Morling, their attorneys:

Whereas George Schlosser has lately sued out a writ of error to the Supreme Court of the United States from a judgment and decision lately rendered in the supreme court of Iowa in favor of W. L. Hemphill, Richard Ryan and Palo Alto County, Iowa, and the said George Schlosser has filed the security required by law and perfected his said writ of error, you are therefor- hereby cited to appear before the Supreme Court of the United States, at the city of Washington, on the second Monday of October next, 1904, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Des Moines, Iowa, on the 12th day of December, A. D. 1903.

CHARLES A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

DES MOINES, IOWA, *December* 12, 1903.

Due and legal service accepted of the foregoing order and citation.

E. B. EVANS,
Attorney for Defendants in Error, &
MORELING & DAVIDSON.

182 In the Supreme Court of Iowa.

Filed June 3rd, 1902.

GEORGE SCHLOSSER
vs.
W. L. HEMPHILL, RICHARD RYAN, ET AL., Appellants.

Appeal from Palo Alto district court—W. B. Quarton, judge.

This is an action in equity to quiet title to a tract of some two hundred and ninety acres of land in the south half of section 30, township 97 range 34 in Palo Alto county. Plaintiff is the admitted owner of lots 2 and 3 forming a part of said tract and containing about ninety nine acres. According to the original Government sur-

vey made in 1857, this land was adjacent to a lake which was meandered, and the meander lines were run along the north side of the said two lots. The remainder of the land claimed lies between this meander line and the alleged shore of the lake, and is the subject of the controversy.

The half section in question, that is such part of it as lies beyond the original meander line, was re-surveyed by the Government in the year 1898 and platted into five lots, of which lots 11, 14 and 16 are claimed by defendant Hemphill and lots 12 and 13 by defendant Ryan. These claims are founded upon conveyances from Palo Alto county, under a patent issued to the State, under the swamp land grant of 1850 and which is based upon the re-survey of 1898. Schlosser insists that the meander line is not his boundary, it not marking the edge of the lake, but that he is entitled to claim up to the east and west half section line of said section.

183 There was a decree for plaintiff and defendants appeal.

E. B. Evans and Morling & Davidson, for appellants.
Buck & Kirkpatrick and Carr & Parker, for appellee.

WATERMAN, *J.*:

Lots 2 and 3 which plaintiff admittedly owns, are bounded on the south by the south section line and they extend almost across said section from east to west. Plaintiff's claim was once before presented to this court in an action of a similar nature to this, but against a different defendant. See Schlosser *vs.* Cruickshank, 96 Iowa 414. Plaintiff was then successful. But that was before the re-survey and issuance of a patent and the making of conveyance by the county. And more than this, in the other case Schlosser claimed title only to the actual margin of the alleged lake, while here he claims to the half section line, which was first run through this section by the resurvey of 1898.

It is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In the former case we found on the evidence then before us, that there was a tract of about one hundred acres between said line and the actual shore of the lake.

When a body of water is meandered, such lines are not run as boundaries, but merely for the purpose of defining the sinuosities of the shore and as a means of ascertaining the quantity of land to be paid for by the purchaser.

Schlosser *vs.* Cruickshank, *supra* and authorities therein cited.

In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, the adjoining owner will usually take title to the actual shore line. And it may doubtless be properly conceded that no subsequent resurvey by the Government in the absence of fraud

or error so gross as to be in the nature of a fraud in the original survey, could affect his title thereto.

184 Mitchell & Smale, 140 U. S., 819.

But where there is no adjacent body of water proper to be meandered the rule we have mentioned will not apply. In such a case the meander line will be a boundary line, and one who purchases from the Government according thereto cannot claim title beyond it. Grant *vs.* Hemphill 92 Iowa 218; French-Glen L. S. Co. *vs.* Springer 22 S. C. Rep. 563.

We have then to determine whether there was a body of water in section 30, proper to be meandered. As to what bodies of water should be meandered see Lester's Land Laws (ed. 1860) 714. We do not intend setting out the testimony on this point. It is quite voluminous and very conflicting. From a careful reading of it we reach the conclusion there was no such body of water. That there was swampy and low land in section 30 north of plaintiff's lots admits of no question and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there. The lake spoken of in Schlosser *vs.* Cruickshank, as being about two miles wide, three miles long and 10 to 18 feet deep and adjacent to this land is evidently Lost Island lake, which lies south of section 30 and nowhere touches it. The meandered lake which gives rise to this controversy is called Mud lake and as must be manifest from what we have said, lies north of plaintiff's land. How far, if at all, this mistake affected the conclusion in the Cruickshank case, we are not able to say, but that it was an error is clear from the fact that neither witnesses or counsel for plaintiff claim Mud lake to answer at all to the description so given. The confusion seems to have arisen from the fact that the Cruickshank case was submitted in connection with another case involving similar questions.—Caldwell *vs.* Jackson,—but which related to land bordering upon Lost Island lake, and the arguments were made in the latter case.

The case of Grant & Hemphill to which we have alluded above involved Mud lake, as alleged on section 19, which of course adjoins section 30, on the north and the evidence in that case, in

185 which it was found no lake existed adjacent to the land of the plaintiff in that action, seems to have been quite similar to what is relied on here in suppost of Schlosser's case. We are confirmed in our conclusion by plaintiff's present claim. He does not seek to extend his north line to the shore of a lake but to the half section line, which did not appear on the original plat, for with the exception of a very small tract in the northwest corner of the section, the lake was shown to cover that whole sub-division outside of plaintiff's two lots. The half section line certainly does not mark the shore line of any body of water at present or heretofore existing. If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north

of and between the meander line and an existing permanent lake proper to have been meandered, we might perhaps reach a conlusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was, is far south of the half section line according to all the testimony. Beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake.

Rood & Wallace, 109 Iowa, 51.
Noyes *vs.* Board of Supervisors etc. 104 *id.* 174.

The fact that plaintiff claims beyond the shore line when taken in connection with the testimony going to show that the greater part of such body of water was but temporary in character, is sufficient to convince us that no meander line should ever have been run here. Plaintiff's present claim and the facts and arguments in its support tend to clear the half section in question of any lake and indeed to remove such permanent body of water wholly from the map. We are further inclined to believe that when the meander line deviates so far from the true shore as it does in this case, from the bank of the body of water attempted to be bounded according to all the evidence and the concessions of counsel, the error would be so gross as to warrant a re-survey.

Cragin *vs.* Powell, 128 U. S. 691;
Mich. L. L. Co. *vs.* Rust 168 *id.* 589.
Wiles & Cedar Point Club 175 *id.* 300.

186 While it is true the significant question before us is the condition that existed when the original survey was made, and that attempts to show this must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters, yet it appears beyond question here that the meander line was not correctly run in the first instance, and we think it is satisfactorily disclosed that no body of water necessary to be meandered then existed where Mud lake is shown on the plat to be.

2. Plaintiff rests his claim of title also upon adverse possession. It is said he and his grantors have been in possession of the disputed tract claiming title thereto for much more than ten years prior to the beginning of this action—that the swamp land act of 1850 was a grant *in præsenti* and that the statute of limitations will run against a county. The grant of swamp lands which had been surveyed and platted was *in præsenti* and it has been said passed title to the State, and from the State such title passed to the counties by the act of the General Assembly of 1853.

Smith *vs.* Miller, 105 Iowa 538;
Bailey *vs.* Callanan, 87 *id.* 107;
Am. Em. Co. *vs.* Fuller, 83 *id.* 599.

But it was an inchoate title only that passed under the act to the State. The legal title remained in the United States until a patent

was issued. Ogden *vs.* Buckley, decided at present term; Rogers L. Works *vs.* Am. Em. Co. 164 U. S. 559; Mich. L. & L. Co. *vs.* Rust, *supra*. Furthermore the swamp land act did not operate to convey any interest in lands unsurveyed at the date of its passage. A survey into legal subdivision is a necessary pre-requisite to the passing of title from the Government. Boynton *vs.* Miller 22 Iowa 579. So long as title remained in the United States the statute of limitations would not run.

Durham *vs.* Hussman 88 Iowa 29;
1 A. & E. Enc. of Law 875,

and cases there collected. This land was not surveyed until the year 1898. Before it was laid out into legal subdivisions, neither State or county could make a selection or assert any title to
187 it. See further on this point;
Iowa R. R. Land Co. *vs.* Adkins, 38 Iowa 351; Chicago R. I. & P. R. Co. *vs.* Allfree, 64 *id.* 500;

In our opinion the plaintiff has no right to any other than the land patented to his grantor, and the decree of the trial court must therefore be

Reversed.

188 In the Supreme Court of Iowa.

Filed Dec. 11, 1903. Jno. C. Crockett, Clerk Supreme Court.

GEORGE SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, and Palo Alto County, Iowa, Defendants in Error. } Petition for Writ of Error.

To the supreme judges of the State of Iowa:

Your petitioner represents that on the 3rd day of June, A. D. 1902, there was rendered a decision in this court wherein George Schlosser was appellee and W. L. Hemphill, Richard Ryan and Palo Alto County, Iowa, were appellants, by which decision the judgment of the district court of Palo Alto county, Iowa, was reversed and judgment was rendered against appellee for the title to the land involved in said suit, towit: about 191 acres of land in the south ½ of section 30, township 97, range 34 in Palo Alto county, Iowa, and costs, said decision and judgment being based upon an erroneous construction by the supreme court of said State of Iowa of the rights of said Geo. Schlosser in and to said real estate under the acts of Congress of the United States.

Your petitioner further represents that he desires to take the opinion of the Supreme Court of the United States upon the ques-

tions therein involved, and that the construction of certain statutes of the United States is involved in said decision and judgment, and your petitioner further asks that a writ of error be allowed in said cause, whereby the same may be reviewed upon error in the Supreme Court of the United States; and your petitioner asks that a stay — execution may be had during the pendency of said cause in said court of the United States, and that a supersedeas bond be fixed in such sum as may be reasonable and just to secure the payment of said judgment.

GEO. E. CLARKE,
Attorney for Geo. Schlosser, Plaintiff in Error.

CHAS. A. CLARK, *Of Counsel.*

189 STATE OF IOWA, }
Kossuth County, } ss:

Geo. E. Clarke, being duly sworn deposes and says that he is the attorney for Geo. Schlosser, the plaintiff in error named in the foregoing petition; that he has read the foregoing petition and knows the facts stated therein, and that the same are true as he verily believes.

GEO. E. CLARKE.

Subscribed and sworn to before me by said Geo. E. Clarke this 8th day of December, 1903.

[Notarial Seal of John W. Sullivan, Iowa.]

JOHN W. SULLIVAN,
Notary Public.

190 In the Supreme Court of Iowa.

Filed Dec. 11, 1903. Jno. C. Crockett, Clerk Supreme Court.

GEORGE SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, and PALO ALTO COUNTY, IOWA, Defendants in Error.

Geo. E. Clarke attorney for plaintiff in error.
E. B. Evans and A. E. Morling, attorneys for defendants in error.

Assignment of Errors.

Comes now George Schlosser and assigns error upon the decision and final judgment rendered in this cause in the opinion and decision filed herein by the judges of the supreme court of Iowa, on the 3rd day of June, A. D. 1902, as appears upon the face of the

record in said decision and judgment in the following particulars, to-wit:

1. Under the laws, statutes and decisions of the United States the meander line is not the boundary line of lots sold by the United States, but is run for the purpose of conforming to the irregularities and sinuosities of creeks and lakes for the purpose of ascertaining the amount of land for which the Government charged upon the sale thereof

2. The court erred in holding and deciding in its said opinion and decision that plaintiff in error was not the owner of the real estate involved in said controversy.

3. The court erred in construing the laws of the United States not to convey title under the patents issued by plaintiff's grantor to lots 2 and 3 of section 30, township No. 97, range No. 34, west 5th P. M. Iowa.

4. The court erred in holding that under the swamp land act of September 28th, 1850 (9 Stat. at L. 520, Rev. Statutes. sec. 2479 *et seq.*), and patents of the United States dated October 10th, 1874, that plaintiff's mesne grantor did not acquire title to the land in controversy.

5. The court erred in holding that the swamp land act of September 28th, 1850, (9 Stat. at L. 520, Rev. Statutes. sec. 2479
191 *et seq.*), did not convey title prior to the survey of the land in question into legal subdivisions.

6. The court erred in refusing to follow the decisions of the Supreme Court of the United States in construing the statutes of the United States as applied to meander lines.

7. The court erred in refusing to follow the decisions of the Supreme Court of the United States in construing the statutes of the United States as applied to lands included in patents issued by the United States.

8. The court erred in holding that a new survey of the lands in controversy could affect plaintiff's title acquired by patent from the United States, dated October 10th, 1874.

9. The court erred in holding that there was any authority of law under the statutes and acts of Congress authorizing a re-survey or further survey of land under the facts disclosed in this case.

10. Under the statutes and various acts of Congress in relation to surveys and sales of the public domain, the original survey as disclosed in this case, and the sale by the Land Department of the United States, and the patents issued by the United States in pursuance of such sale, conveyed title to plaintiff's grantor, and plaintiff, by mesne conveyance from such grantor, took title to the land in controversy, and in said judgment and decision, the supreme court of Iowa erred in refusing to establish and quiet the title of plaintiff in error thereunder.

And thereupon, upon the foregoing assignment of errors, the said George Schlosser respectfully asks and prays that upon the writ of

error granted upon his petition and for the review of the errors herein assigned that the said judgment and decision of the supreme court of Iowa may be reversed, and the action, decision and judgment of the said supreme court of Iowa may be set aside; and said George Schlosser will ever pray.

GEO. E. CLARKE,
Attorney for George Schlosser, Plaintiff in Error.
CHAS. A. CLARK, *Of Counsel.*

192 [Endorsed:] In the supreme court of Iowa Geo. A. Schlosser plaintiff in error *vs.* W. L. Hemphill Richard Ryan & Palo Alto Co. Iowa defendants in error Petition for writ of error & assignment of errors Filed the 11th day of Dec. 1903. Charles A. Bishop, C. J. sup. court, Iowa. Geo. E. Clarke attorney for plaintiff in error

193 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between George Schlosser, plaintiff, and W. L. Hemphill, Richard Ryan and Palo Alto County, Iowa, defendants, wherein was drawn in question the construction of certain statutes of the United States affecting the right and ownership of the said George Schlosser to certain real estate in the south ½ of section No. 30 in township No. 97, north range 34, west 5th P. M. Iowa, and said decision being contrary to the rights of plaintiff under said statutes, and a manifest error has happened, to the great damage of said George Schlosser, as by his complaint appears, we, being willing that error, if error hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ; so that you have the same at Washington on the 10th day of January next, in the said Supreme Court, to be then and there held, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
194 the Supreme Court of the United States, the 11th day of December, A. D. 1903.

[L. S.] EDWARD R. MASON,
Clerk U. S. C. C., Southern District of Iowa.

Allowed.
CHAS. A. BISHOP,
Chief Justice of the Supreme Court of Iowa.

195 In the Supreme Court of Iowa.

GEO. SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, & PALO ALTO Co., Iowa, Defendant- in Error.
} Order Extending Time.

Be it remembered that on this 6 day of Jan. 1904 it appearing to the undersigned judge of the supreme court of Iowa who signed the citation here-fore issued herein that owing to a destructive fire wherein a portion of the capitol or state house of the State of Iowa was on the 4th inst. destroyed and owing to the confusion and delay incident thereto in the office of the clerk of the supreme court and owing also to the unusual amount of work the time for return in the above entitled case is hereby extended twenty days beyond the time fixed in the original writ issued herein.

Witnessed my hand this 6 day of Jan. 1904.

CHARLES A. BISHOP,
Judge of — Court of Iowa.

[Endorsed:] Filed Jan. 6, 1904. Jno. C. Crockett, clerk supreme court.

196 In the Supreme Court of Iowa.

GEO. SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL, RICHARD RYAN, & PALO ALTO Co., Defendant- in Error.
} Order Extending Time.

STATE OF IOWA, *Polk County,* } *ss:*

John C. Crockett being duly sworn deposes and says he is the clerk of the supreme court of Iowa; that by reason of condition of affairs in his office, the large amount of work at hand at just the present time and the confussion and delay incident to the late fire in the wing of the capitol where his office is situated additional time is necessary to prepare and certify the record in the above entitled cause to the Supreme Court of the United States.

JOHN C. CROCKETT.

Subscribed and sworn to before me by John C. Crockett this 7" day of Jan. 1904.

[Notarial Seal of F. W. Crockett, Iowa.]

F. W. CROCKETT,
Notary Public, Polk County, Iowa.

[Endorsed:] Filed Jan. 7, 1904. Jno. C. Crockett, clerk supreme court.

197 STATE OF IOWA, ss:

I, Jno. C. Crockett, clerk of the supreme court of Iowa, do hereby certify, that the foregoing is a true and correct transcript of the record, decision of the supreme court of Iowa, and final judgment rendered in a cause entitled George Schlosser, *vs.* W. L. Hemphill, Richard Ryan, and Palo Alto Co. Iowa.

And I further certify that I have retained in my office true and correct copies of petition of writ of error, the writ, bond, citation, and assignment of errors, order extending time and affidavit and the original of the same I hereto attach and return herewith as a part of the return to said writ, and this return is made in obedience to said writ of error.

In testimony whereof witness my signature and official seal hereto attached at the city of Des Moines in the State of Iowa on this 14 day of January A. D. 1904.

[Seal of the Supreme Court of Iowa.]

JNO. C. CROCKETT,
Clerk of the Supreme Court of Iowa.

Endorsed on cover: File No. 19,204. Iowa supreme court. Term No. 175. George Schlosser, plaintiff in error, *vs.* W. L. Hemphill, Richard Ryan, & Palo Alto County, Iowa. Filed January 18", 1904. File No. 19,204.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

GEORGE SCHLOSSER, Plaintiff in Error,
vs.
W. L. HEMPHILL ET AL. } No. 175.

In error to the supreme court of the State of Iowa.

Stipulation.

I.

It is hereby stipulated that the record in this cause be amended by filing herein the annexed transcript of judgment in said cause by the supreme court of Iowa, the same to be printed with this stipulation, and to be taken and considered as a part of the record in said cause upon final submission and hearing.

II.

It is stipulated and admitted that the transcript of record hereto annexed shows the final judgment of the supreme court of Iowa entered in this cause, and that the said judgment was by inadvertence and oversight omitted by the clerk of said supreme court of Iowa in his return to the writ of error herein.

III.

This stipulation is entered into to obviate delay and expense in securing a full and perfect record in this court, and is designed to authorize an order by this court for amendment of the record as herein stipulated and set forth.

Dec. 6th, 1904.

CHAS. A. CLARK,
GEO. E. CLARKE,
Attorneys for Plaintiff in Error.
E. B. EVANS,
H. C. EVANS,
Attorneys for Defendants in Error.

Supreme Court of Iowa.

STATE OF IOWA, ss:

Be it remembered, that on the 3rd day of June A. D. 1902, the following proceedings, among others, were had and entered of record in the supreme court of Iowa, to-wit:

Appeal from Palo Alto district court.

GEORGE SCHLOSSER
vs.
W. L. HEMPHILL ET AL., Appellants. } No. 21489.

In this cause, the court being fully advised in the premises, file their written opinion reversing the judgment of the dist. court.

It is therefore considered by the court that the judgment of the court below be and it is hereby reversed and set aside and the cause is remanded for further proceedings in harmony with the opinion of this court and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellee pay the costs of this appeal, taxed at $227.70 and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the record entry of said court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

Seal of the Supreme Court of Iowa.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court this 1st day of December A. D. 1904.

JNO. C. CROCKETT,
Clerk Supreme Court,
By —— ——, *Deputy.*

[Endorsed:] File No. 19,204. Supreme Court U. S. October term 190–. Term No. 175. Geo. Schlosser, P. E., *vs.* W. L. Hemphill *et al.* Stipulation and addition to record. Filed Dec. 10, 1904.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 10 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NO. 175.

GEORGE SCHLOSSER, *Plaintiff in Error,*

—vs—

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ON MOTION OF DEFENDANTS IN ERROR TO DISMISS.

BRIEF FOR PLAINTIFF IN ERROR.

BY CHAS. A. CLARK AND GEO. E. CLARKE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NO. 175.

GEORGE SCHLOSSER, *Plaintiff in Error,*

—vs—

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ON MOTION OF DEFENDANTS IN ERROR TO DISMISS.

BRIEF FOR PLAINTIFF IN ERROR.

BY CHAS. A. CLARK AND GEO. E. CLARKE.

ADDITIONAL FACTS.

The attention of the Court is directed to the following facts shown by the Record in addition to those set forth in the brief of counsel for defedants in error. We deem these additional facts requisite to enable the Court to pass upon the motion of defendants in error to dismiss the writ of error

in this case upon the ground that no federal question is involved.

FACTS.

The original survey of the land in controversy was made in 1855. See letter of Secretary of Interior, being Exhibit 26, Record p 75. Also government field notes of original survey, Record 120, last line at bottom of page, and Record 121.

A copy of the plat of this original government survey is in evidence, and found on page 11 of Record, as Exhibit "D".

This plat shows the larger portion of Section 30, in which the land in controversy is situated, and also Section 19, north of said Section 30, to be pond or lake, and not subdivided or surveyed.

The field notes of this original survey are found on pages of the Record 56, 57, and 120-121.

These field notes show a lake on said section 30 and adjoining sections.

The Honorable Secretary of the Interior says of this lake in his letter, Exhibit 25,

"From the official plat of said township it appears that the lake extends into four townships; Viz: townships 96 and 97. Range 34 & 35, is about 5½ miles long, and from half a mile to a mile in with." (Record p 75.)

In that letter, which was dated March 8, 1898, (Record p 74) he ordered a re-survey of the land in said section 30 and other sections. In approving this re-survey the Honorable Secretary of the Interior said in his letter of June 25th, 1898, being Exhibit 26,

"With his report Mr. Barber submitted a plat showing that the land in question is mostly agricultural in character, with a wet, marshy pond called "Mud Lake" covering portions of Sections 25 and 30, with an outlet going west into Trumbull Lake." (Record pp 75-76.)

A plat of so much of the re-survey of Mr. Barber as relates to said Section 30 is in the Record, page 73, as Exhibit 2.

This plat shows a lake on Section 30 at the time of the the re-survey. It gives the meander line of the original survey, under which plaintiff in error claims, and shows the actual margin of the lake to run almost wholly north of the south half of Section 30, which is the land claimed by plaintiff in error under the patent of his remote grantor.

The field notes of this re-survey by Mr. Barber are in evidence as Exhibit 31. (See Record pp 80-81.) These field notes show a lake on Section 30 corresponding with this plat above referred to, being Exhibit 2. The name of this lake is set forth in these field notes as "Mud Lake". The Record

shows throughout that this is the name by which the lake has always been known. The government patent under which plaintiff in error claims is in evidence. It conveys,

"Lots number 2 & 3, of Section 30, * * * * according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General, * * * * To have and to hold the said tract of land, with the appurtenances thereof * * * * forever." (Record pp. 119-120.)

This patent is dated October 10, 1874, practically more than twenty-four years before the re-survey under which defendants in error claim title.

There is no evidence in the Record as to the extent or depth of Mud Lake at the time of the government surveys in 1855. The witnesses for defendants in error first saw this lake, or the land in controversy, as shown below;

P. M. Moore, in 1894 or 5, Record p 34,
J. W. Wilcox, in 1900, Record p 39,
J. T. Painter, in 1890 and 1897, Record pp 41-2.
W. L. Hemphill, in 1890, Record p 45,
M. L. Parr, in 1878, Record p 46,
S. Banfill, in 1871, Record p 47,
Frank Gandy, in 1900, Record pp 52 & 10,
Edward Beatty, in 1890, Record p 57,
E. D. O'Neil, in 1895, Record p 59,
Richard T. Ryan, in 1898, Record p 60,
James Valley, in 1900, Record pp 64 & 10,
Alex. Hemphill, in 1890, Record pp 65 & 10,
Hiram Davis, in 1866, Record p 68,
Edward McNalley, in 1900, Record p 70,
E. B. Evans, in 1898, Record p 71,
Deala Ryan, in 1898, Record p 81,
Jas. Spalding, in 1871, Record 89.

M. L. Parr testified for defendants in error:

"All the lakes up north there, Lost Island Lake, and all the other lakes, were higher twenty years ago than in later years; Lost Island was three or ——— feet higher. Mud Lake correspondingly high." (Record p 46.)

No other witnesses testified to the contrary of this. The trial court, being the District Court of Palo Alto County, Iowa, sustained the contention of plaintiff in error that by virtue of the patent to Anthony, under which he claimed, and the plats and records of the Government Land Office, he became owner of the land in controversy; and decreed that plaintiff in error,

"Is the absolute and unqualified owner in fee simple of lots 2 and 3, section 30, township 97, range 34, including all of the land lying between the Government meander lines,

and the high water mark of a certain body of water known as Mud Lake, as well as the land lying between said meander line and the half section line of said section 30, except the land lying under the high water mark, and being covered by the waters of said lake. He is hereby entitled to immediate possession of said premises, and that a writ of removal issue to remove defendant from the possession of said land." (Record pp 96-97.)

This decree the Supreme Court of Iowa reversed, holding that the government patent under which plaintiff in error claims conveyed to his remote grantor, and to him, nothing beyond the meander line of the lots described in such patent. To reverse this judgment the plaintiff in error brings the writ of error which it is now moved to dismiss.

ARGUMENT.

I.

WHAT PLAINTIFF IN ERROR CLAIMS.

Plaintiff in error claimed, and contended in the courts below, that a proper construction of the survey and patent to Anthony, his remote grantor, gave riparian rights along Mud Lake covering the land in dispute.

That claim is distinctly and specially set up in his petition.

Record pp 1 & 2.
Brief of Defendants in Error, pp 5 & 6.

This contention was distinctly sustained by the decree of the trial court in his favor as set forth in the foregoing statement of facts. (See p 3, supra.) It was distinctly rejected and denied by the Supreme Court of Iowa, which said in its opinion:

"Plaintiff's claim was once before presented to this Court in an action of a similar nature to this, but against a different defendant. See Schlosser vs. Cruickshank, 96 Iowa 414. Plaintiff was then successful." * * * *

"It is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In the former case we found on the evidence before us, that there was a tract of about one hundred acres between said line and the actual shore of the lake.

"When a body of water is meandered, such lines are not run as boundaries, but merely for the purpose of defining the sinuosities of the shore and as a means of ascertaining the quantity of land to be paid for by the purchaser.

Schlosser vs Cruickshank, supra, and authorities therein cited.

"In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, the adjoining owner will usually take title to the actual shore line. And it may doubtless be properly conceded that no subsequent resurvey by the Government in the absence of fraud or error so gross as to be in the nature of a fraud in the original survey, could affect his title thereto. * * * That there was swampy and low land in section 30 north of plaintiff's lots admits of no question and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent exi ted there. * * * * The meandered lake which gives rise to this controversy is called Mud Lake and as must be manifest from what we have said, lies north of plaintiff's land."

Record pp 126, 127, 128.
Brief for Defendants in Error, pp 21, 22.

That court, therefore, decided, and necessarily decided —it was compelled to decide in order to defeat the title of plaintiff in error—that the legal effect of the patent specially set up by him, and under which he specially claimed, in connection with the government survey and plat, did not give him title to the land in controversy.

That question, we shall see, was, under the decisions of this court, a federal question.

The ground upon which the learned Supreme Court of Iowa arrived at this conclusion is thus stated in its opinion;

"While it is true that the significant question before us is the condition that existed *when the original survey was made*, and that attempt to show this must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters, *yet it appears beyond question here that the meander line was not correctly run in the first instance, and we think it satisfactorily disclosed* that no body of water *necessary* to be meandered then existed where Mud lake is shown on the plat to be." The italics are ours:

Record p 128.
Brief of Defendants in Error, p 24.

Thus while it is conceded by that tribunal that the meander line of the lots described in the patent under which the plaintiff in error claims was so run, as shown by the government plat and survey, that he would under all the authorities,

be entitled to lands north thereof as far as the shore of the lake—i. e., to the high water line of the lake—yet his title is defeated upon the ground that "we *think* * * * that no body of water necessary to be meandered then existed where Mud Lake is shown on the plat to be."

In other words, the *ipse dixit* of this learned tribunal, nearly a half century after the government surveys, under which plaintiff in error claims—without pleading and a scrap of evidence as to the character of Mud Lake at the time the survey was made—is set up to over-turn this survey, and to over-turn the title of plaintiff in error.

This presents a *federal question*. We hardly need to point out that the claim of plaintiff in error under the patent, survey, and plat, is a claim under "authority exercised under the United States," which authority was distinctly repudiated and denied, and decided against, by the court below.

The 6th, 7th, 8th, 9th and 10th assignments of errors, especially the latter, distinctly present these questions for determination in this court. (Record p 131; Brief of Defendants in Error, pp 26, 27).

II.

FEDERAL QUESTION.

In a case where the writ of error was to the Supreme Court of Oregon, the plaintiff in error claimed under a patent to certain fractional lots, the government survey and plat of which showed that the lots were bounded on the north by the meander line of Malheur lake. It was claimed for the defendant that no part of this lake was in front of the lots, and, as stated in the opinion in the case, "if the east and west exterior lines of said lots were extended north indefinitely they would not touch or intersect the margin or border of the lake, but would leave it entirely to the east thereof; * * * that the border of the lake never at any time extended to the supposed meander line." (185 U. S., 50.) This question of fact was submitted to a jury who found against the plaintiff in error, whereupon judgment was rendered against him, which judgment was affirmed by the Supreme Court of Oregon, and a writ of error taken from this court to said tribunal. This court said, passing upon the jurisdictional question, opinion by Mr. Justice Shiras:

"As the case went off in the Oregon courts on this question of fact, it may be questionable whether any matter of Federal law is left open for our revision. However, as the plaintiff in error contended, in the courts below and in this court, that a proper construction of the survey and patents gave riparian rights covering the land in dispute, and that

it was not competent to overcome such rights by evidence affecting the legal import of the plats and patents, we think a Federal question is thus presented.

"For the reasons already given, we think that, while the plats are conclusive as to the meander line, and while *if there was a lake abutting on or to the north of the lots, the plaintiff in error would take all land between the meander line and the water, and all accretions,* it was competent for the defendant to show that there was not, at the time of the survey nor since, any such lake, and to contend that, in such a state of facts, there could be no intervening land and no accretion by reliction."

French-Glenn Live Stock Co. vs Springer, 185 U. S., 54.

If in that case where as a matter of fact, tried to and found by a jury, there was no body of water whatever adjoining the meander line, it was still a federal question as to the construction of the survey and patents under which plaintiff in error claimed, how much more is a federal question presented in the case at bar where a body of water existed in front of the meander line at the time of the survey, and continues to exist up to the present time, the only question regarding it being its character, permanency, and depth.

We submit that this Oregon case is conclusive that a federal question is shown by the Record in the case at bar.

In a later case brought on error to reverse the judgment of the Supreme Court of Indiana, the plaintiff claimed through mesne conveyances under a patent of the United States conveying fractional sections fronting upon a meander line on certain non-navigable water, its claim being to land beyond the meander line under riparian rights; the defendant, as in the case at bar, claimed under a subsequent survey ordered by the Land Department. The decision in the state courts was in favor of the plaintiff. The majority opinion of this court made no question that a federal question was presented, nor does the question appear to have been raised by counsel in the case either by motion to dismiss, or otherwise.

Upon the ground that by the common law as interpreted and recognized by the courts of Indiana, plaintiff's patents included the riparian rights contended for, and the land in controversy, this court affirmed the judgment of the Supreme Court of Indiana. There was a dissenting opinion, by Mr. Justice White, concurred in by Mr. Justice McKenna. In this dissenting opinion it is said:

"The right of the defendants under patents of the United States, which they specially set up, having been denied,

because it was conceived by the court below that no title vested in them under the laws of the United States, it would seem that the question arising for decision is this: Did the court correctly interpret the statutes of the United States?

"This is a Federal question. But it is pressed that what title to the beds of the lakes passed to the State from the United States, either under the swamp land act or in virtue of the patents issued to the State, is to be determined, not by the law of the United States, but solely by the state or local law; hence it is insisted the case must be decided by the law which is rightfully applicable to it and not by the law of the United States, which the Supreme Court of Indiana erroneously deemed was essential to its decision. If I entertained the opinion that the state or local law governed, and in consequence that this case was to be disposed of by considerations inherently local, I would, of course, be obliged to conclude that the controversy must be judged by that law which properly controlled it and not by the law of the United States, which was mistakenly applied by the lower court. In that view my mind would be driven to the conclusion that this case should be dismissed for want of jurisdiction, since here there is no authority to review the action of the state court in a case inherently depending upon the state or local law." (190 U. S., 474–5.)

The majority opinion in the case awarded the land to the plaintiff under the local or state law; that is, the local or state interpretation of the common law, as already pointed out. In retaining and deciding the case, therefore, this court necessarily held, notwithstanding this feature of the case, that the question of the effect of the patents under which the plaintiff claimed was a federal question, and declined to yield to the reasoning of Mr. Justice White in the dissenting opinion. We apprehend that if this court had been of opinion that no federal question was presented in the view of the case as decided by it, and as urged by Mr. Justice White, it would, passing upon its own jurisdiction, as it is always bound to do, have dismissed the case *sua sponte*.

This very late case also seems to us decisive against the contention of defendants in error in the case at bar. It is the case of

Kean v Calumet Canal Co., 190 U. S., 452.

In a case decided in 1893 arising on error to the Supreme Court of Oregon there was involved a donation claim under Act of Congress of September 27, 1850. The government patent decribed the land as bounded by the Columbia river. The question involved under the patent was whether claimants under it took title to land below high water mark. The Supreme Court of Oregon held that they did not.

The jurisdictional question in this court was, therefore, substantially the identical question presented by the motion of defendants in error to dismiss in the case at bar.

In determining this jurisdictional question it was said in the Oregon case, opinion by Mr. Justice Gray:

"The judgment against its validity proceeded upon the ground that the grant from the United States upon which it founded passed no title or right, as against the subsequent deeds from the state, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court. Rev. Stat. Par. 709. That jurisdiction has been repeatedly exercised, without objection or doubt, in simi'ar cases of writs to the state courts. Railroad Co. v Schurmeir, 7 Wall., 272; Packer v Bird, 137 U. S., 661; Knight vs United States Land Association, 142 U. S., 161. * * * * The present case being clearly within our jurisdiction, we proceed to the consideration of its merits."

Shively v Bowlby. 152 U. S., 9 & 10.

These authorities are very pursuasive, and, indeed, we think, conclusive upon the precise question involved in the case at bar.

2. Furthermore, in a case where the evidence shows without conflict that there was an actual body of water known as Mud Lake, which continues to the present time and with reference to which a meander line was actually run, and this survey was accepted by the Land Department, and patent issued thereunder to plaintiff's remote grantor, we emphatically deny the jurisdiction or power of the state courts to review the action of the Land Department and to hold, nearly half a century after the survey and more than a quarter of a century after the patent, that the body of water was not "proper" to be meandered.

The synonyms of "proper" according to standard dictionaries are: "Admissible"; "Appropriate"; "Becoming"; 'Convenient"; "Modest";

Whether the matter is to be construed from the standpoint of modesty, convenience, admissibility, or otherwise, the questions are obviously for the Land Department, and not for the courts.

Especially is this so where there is no evidence whatever as to the actual condition of the lake at the time of the survey, and for many years thereafter, and where the court below itself said this question "must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters."

This assumed power of the learned court below involves an essential and inherent federal question. It is found in the very dictum of the court itself. It involves the legal effect of the patent under which plaintiff claims under the land laws, public surveys, and action of the Land Department of the United States as construed and determined by the decisions of this court.

The very invention and enforcement of such a theory by the court of last resort of a state gives plaintiff in error the right to combat and contest that theory as a federal question in this tribunal.

To hold otherwise is to unsettle and to bring into distressing uncertainty land titles derived from the Government over a great area of country, including many great states, and to make them dependent upon the notions of propriety, or what is "proper" on the part of local tribunals, which must in turn involve wet seasons and dry seasons, or a succession of them, and when reduced to ultimate terms depend essentially upon the weather, and possibly upon the prognostications of the weather bureau.

The patent under which plaintiff claims title conveys his fractional lots "according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General." (Record p 120.)

The decision of the court below rejects the official plat and survey as not "proper", and thus in terms decides against the authority exercised under the general government under which plaintiff in express terms claims title to the land involved. The plat, survey, and field-notes, showed a meander line with reference to the margin of Mud Lake.

"In preparing the official plat from the field-notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water course and not the meander line as actually run on the land is the boundary."

Ry. Co. v Schurmeir, 7 Wall., 287.

"The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary."

Hardin v Jordan, 140 U. S., 380.

Such is the undoubted legal effect of a government patent of land fronting upon a meander line along a body

of water. This legal effect of the patent under which plaintiff claims has been recognized and enforced by the Supreme Court of Iowa with reference to the very land in controversy.

Schlosser v Cruickshank, 96 Ia., 414.

That learned court says in its opinion in the case at bar:

"Plaintiff's claim was once before presented to this court in an action of a similar nature to this but against a different defendant. * * * In the former case we found on the evidence then before us that there was a tract of about one hundred acres between said line and the actual shore of the lake." (Record p 126.) (Brief for Defendant in Error, p 21.)

"The meandered lake which gives rise to this controversy is called Mud Lake, and, as must be manifest by what we have said, lies north of plaintiff's land."

"We have, then, to determine whether there was a body of water in section 30 PROPER to be meandered." (Record p 127.) (Brief for Defendants in Error, p 22.)

And thereupon plaintiff's title was over-turned by denying to the patent the legal effect which that learned court had once given to it, and to which it was and is entitled under repeated decisions of this court. We think this legal effect of the patent and of authority exercised under the Government in its issuance, is not to be thus denied and nullified on a matter of "propriety" without involving a federal question. The court below was without power to thus nullify a government patent and an authority exercised under the Government.

"Great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of Public Lands could do."

Haydel v Dufresne, 17 How., 30.

"That the power to make and correct surveys of the public lands belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; *and that the latter* have no concurrent or *original power to make similar corrections*, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

Cragin v Powell, 128 U. S., 698-9.

"It would lead to endless litigation and be fruitful of evil if any supervisory power were vested in the courts over the action of the numerous officers of the Land Department on mere questions of fact presented for their determination."

Quinby v Conlan, 104 U. S., 426.

"It is this unassailable character (of the patent) which gives to it its chief, indeed its only, value, as a means o quieting its possessor in the enjoyment of the lands it em braces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."

Smelting Co. v Kemp 104 U. S., 641.

Some of these opinions were in actions at law, but they are equally applicable in chancery proceedings where similar questions are involved, as in the case at bar. It is surely a matter of unpleasant surprise to find the decisions of the learned and distinguished court of last resort for a great state and in chancery proceedings as conflicting and uncertain touching this same patent as the verdicts of juries depicted in the case of Smelting Company v Kemp, *supra*; and this condition strikingly illustrates the distressing uncertainties touching land titles which must result if juries or courts may review the action of the Land Department as ot what is "proper" in the surveying of public lands, and the issuance of patents therefor.

If, in addition to this, it can be said that the legal effect of a patent can be annulled by a state court upon the ground of propriety or impropriety in the action of the Land Department, and that no federal question is thus presented, the condition of holders and claimants under government patents will be distressing indeed.

Nor can a re-survey, ordered and made long after the issuance of the patent under which plaintiff claims, with subsequent patents issued after such survey in any manner

touch or affect plaintiff's title. Precisely in point on this question is,

Hardin v Jordan, 140 U. S. 400-1.
Kean v Calument etc Co., 190 U. S., 461,
Grand Rapids, etc., Co. v Butler, 159 U. S., 94-5.
Ry. Co. v Schurmeir, 7 Wall., 289,

And see, Davis v Weibbold, 139 U. S., 507,
Moore v Robins, 96 U. S., 533-4.

It should be further remarked that this is a suit in equity. The plaintiff in error expressly set up in his petition the patent under which he claimed, the meander line of the lake, and his rights with reference to such meander line under the patent.

The defendants in error did not deny the existence of the lake, or assert that it was not a permanent body of water, nor in any manner call in question the propriety, or even the strict legality and rightfulness of the meander line. These issues were discovered and injected into the case for the first time by the learned court below the Court of last resort for Iowa. It is, of course, easy for a court to frame new issues, argue them for itself, apply evidence to them, or bring the questions raised by them to some standard of supposed "propriety", and decide them with reference to that standard against a party litigant whose landed estate is involved. But if his land may thus be taken from him as against a government patent and its legal force and effect in connection with the public plats and land surveys, and he may then be told that no federal question is involved as against his government patent which is his muniment of title, because what is "proper" in land surveys is a question of fact for the decision of the state courts, then a summary manner of disposing of government titles has been found which makes folly of all the cases in the books.

III.

CASES CITED FOR DEFENDANTS IN ERROR.

The only case cited for defendants in error in the brief of their learned counsel upon the motion to dismiss, requiring comment in our view, is that of,

Sweringen v St. Louis, 185 U. S., 45.

In that case, indeed, the plaintiff in error claimed title under a government patent; but the patent conveyed the land by metes and bounds, and the sole question involved in the state court was the location of the lands conveyed by correctly tracing the metes and bounds upon the surface of the earth. The question was simply the identification of the lands conveyed, as it might have been in the case of any

farm or private grant conveyed by like metes and bounds. It was found and adjudged by the state court that the metes and bounds did not carry the east line of the land conveyed to within some hundred of feet of the west bank of the Mississippi river. This court said:

"There was no contention made as to the authority of the government to convey the land to the bank of the river where the water was actually flowing if it chose to do so. The decision did not touch the question as to how far a grant by the government, of land bounded by the waters of a navigable stream, would carry title, whether to high water or low water, or out to the middle of the stream. (p. 41.)

"It is not the case of granting lands bounded by the waters of a navigable river and a claim made to an island in the river in one case and to the lands under water in the other, where the validity of the authority exercised, to the extent claimed, was drawn in question, and the right to convey the land denied. * * * * But it was simply maintained that making correct measurements and construing the language of the grant in the usual and ordinary way applicable to such instruments, (not at all a federal question) *the courses and distances* set forth in the patent and its general description of the land conveyed did not *as a matter of fact bring the eastern boundary to the waters of the river.*" (pp. 43-44.)

The distinction between that case and the case at bar, as well as the cases cited, *supra*, which are substantially in point with the case at bar, is so obvious that discussion would perhaps be unpardonable; at any rate we do not discover the necessity of such discussion to elucidate the clear distinction.

Respectfully submitted,

CHAS. A. CLARK,
GEO. E. CLARKE.
For Plaintiff in Error.

FILE COPY.

Supreme Court U. S.
FILED
FEB 28 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NO. 175.

GEORGE SCHLOSSER, *Plaintiff in Error,*

—vs.—

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA,

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR.

By CHAS. A. CLARK AND GEO. E. CLARKE.

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STATEMENT OF THE CASE.

THE PLEADINGS.

This is a suit in equity. The plaintiff below, plaintiff in error here, by his petition claims that he

"Is the absolute owner in fee simple of lots 2 and 3 in section 30, T. 97, R. 34, that the said lots were surveyed by the Government and platted, and the record of said survey and plats were duly returned to the General Land Office at Washington, D. C., and became a part of the records of said office; that said lots were meandered by the government surveyor, and said meander lines run with reference to a lake then existing in part upon said section, and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation be-

tween said meander line and the lake; that subsequent to the filing of said survey and plat the United States sold said land and issued patent thereto to one John A. Anthony; that by mesne conveyances the land has been transferred to this plaintiff; plaintiff purchased said lots relying upon the fact that the Government had platted and sold said lots without any reservation between the meander line and the lake; about 1899 the defendants without the consent of the plaintiff entered into the possession of all the land between the meander line and the lake proper, and are now claiming title to said land, which claim is adverse to title of plaintiff."

"That the plaintiff's title includes all of the land embodied in the south half of said section and his title is complete to all of said land claimed adversely by the defendants."

And he prays,

"That in event the court should determine the plaintifff is not the owner of all of the land included in the south halff of said section that the court then determine the extent off the boundary of the plaintiff's land and that the court decree that the plaintiff is the fee-simple owner to all land between the meander line and the bank and edge of the lake as meandered, as well as the land between the meander line and the south line of section 30, and that title be quieted in the plaintiff and the defendants barred from having any interest or title in said real estate adverse to this plaintiff, and the defendants be enjoined from cutting and removing timber thereon,, and such other relief as may seem equitable and a writ issue removing the defendants from said premises and placing plaintiff in possession."

ANSWERS.

The answers set up

"As to whether the government issued patents to lots two and three and the plaintiff is the owner of said land the defendant asks the Court to require strict proof; as to whether said lots were surveyed and platted by the government and said survey and plats filed in the General Land Office and as to whether said lots were meandered defendant has not sufficient knowledge to form a belief, and denies the same; the defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30, T. 97, R. 34." (Record pp. 2 and 6.)

The answer of Ryan further claims

"That the patent from the United States and the warranty deeds as set forth in plaintiff's petition in describing said land only purported to convey the number of acres in each lot as shown by the government survey and plats, and that neither said patents not deeds purport in any manner to convey the

land embraced in lots 12 and 13, being a part of the land in controversy, and defendant denies that said patent or deeds conveyed any title whatever to the land embraced in lots 12 and 13." (Record p. 3.)

And the answers further set up as to defendant, Ryan, that on March 8th, 1898, the Secretary of the Interior directed a survey of certain unsurveyed land in sections 19, 20, 29, and 30, Township 97, Range 34, and that said lands were surveyed on the 2nd to the 20th days of April, inclusive, of the year 1898.

That thereafter, in August, 1898, Ryan, having established his residence on lots 12 and 13 of this survey of section 30, entered said lots as a homestead and claimed right to them under such homestead entry. (Record p. 3.)

The defendants, Palo Alto County and Hemphill, by their joint answer set up the same survey of 1898, and that lots 11, 14 and 15 of section 30, as shown by this survey, were swamp and over-flow lands included in the grant of 1850 to the State of Iowa; that these lots had been duly selected by the State under that grant, and approved by the Secretary of the Interior (Record p. 6); by supplemental answer, show that the patents had issued to the State of Iowa under the Swamp Land Grant, who had in turn issued patents to Palo Alto County under that grant (Record p. 9); that Hemphill had purchased the lots from the County, and paid a part of the purchase price, and was in possession under such claim of title.

We do not deem it material to set out some other matters contained in the answers.

For the answers in full see Record pages 2 to 7, and pages 9 and 10; also page 98.

REPLY.

The plaintiff by reply set up

"That all of the proceedings with reference to the resurvey of the land and opening the same for homestead was without authority or jurisdiction for the reason that prior theretofore the United States had caused section 30 to be surveyed and platted and thereafter sold and conveyed said land according to the official plat to John A. Anthony; that by said patent the United States parted with all its title to the land in controversy herein." (Record p. 7.)

And makes the same reply as to the proceedings so far as relates to the alleged swamp land. (Record p. 7.)

By further reply he set up the statute of limitations, and title by prescription. (Record p. 10.)

These replies were made to stand to the amendments to defendants' answers above referred to. (Record p. 112.)

It will be observed that plaintiff's averment as to the lands in the patent under which he claims is

"That said lines were meandered by the Government Surveyor, and said meander lines run with reference to a lake then existing in part upon said section; and the plat as made by said Surveyor, and filed for record as aforesaid, shows the meander line to coincide with the shore line of said lake, and shows no reservation between said meander line and the lake."

The facts regarding this survey, plat and meander lines are only contested by defendants under a simple denial of the facts alleged, and a specific denial.

"That such meander lines were run with reference to a lake then existing in part upon section 30, Township 97, Range 24." Defendants do not claim in their answer that the lake shown by the survey, plat and meander lines, was a lake not "necessary" or "proper" to be meandered. No such issue as this is involved in the case.

DECISION.

The trial court found for plaintiff below and plaintiff in error here, as to lots 2 and 3 covered by the patent under which he claims

"Including all the land lying between the government meander line and the high water mark of a certain body of water known as Mud Lake, as well as the land lying between said meander line and the half section line of said section 30, except the land lying under the high water mark, and being covered by the waters of said lake. He is hereby entitled to immediate possession of said premises, and that a writ of removal issue to remove defendant from the possession of said land."

"It is further decreed that the absolute title in fee simple in and to said premises be and the same is hereby established and quieted in the plaintiff, as an absolute indefeasible fee-simple title, and the defendants are hereby estopped from having or claiming any right, title, interest or estate, in said premises, and they are perpetually enjoined from occupying or using said premises." (Record p. 97.)

On appeal the Supreme Court of Iowa held that plaintiff had no right to any other than the land patented to this grantor, bounded on the north by the meander line and denied his right to any land beyond the meander line (Record pp. 126 to 129), and ordered a judgment entered by the trial court accordingly. (Amendment to Record, p. 2.)

Plaintiff in error thereupon sued out a writ of error herein to review such decision of the Supreme Court of Iowa.

THE FACTS.

The Government patent under which plaintiff claims conveys

"Lots numbered two and three of section thirty, in township ninety-seven of range thirty-four in the district of lands subject to sale at Sioux City, Iowa, containing ninety-nine acres and eighty-hundredths of an acre (excess paid as per receiver's receipt No. 2213) according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general. * * * "

"To have and to hold the said tract of land with the appurtenances thereof, unto the said John A. Anthony and to his heirs and assigns forever." (Record p. 120.)

Exhibits B, C. and D offered in evidence by plaintiff are conveyances from the original patentee and his grantees vesting the title to the patented land in plaintiff. (Record pp. 10 and 11.)

GOVERNMENT SURVEY, PLAT AND FIELD NOTES.

The Government plat of the original survey introduced in evidence shows that nearly all of section 30, except lots 2 and 3, covered by the patent under which plaintiff claims, together with large portions of adjoining sections, was meandered.

Plaintiff's land, lots 2 and 3, is on the south side of said section. A fragment of the northwest corner is meandered and surveyed as lot one; the remainder is not subdivided. (Record p. 11. See Exhibits E and F.)

There were two surveys with field notes relating to this section. The first covers the exterior township line upon which section 30 borders on the west adjoining section 25 in the next township on the west. That survey was made July 27, 1855. The accompanying field notes are as follows:

"North between sections 25 and 30, var. 11° 45′ E.

16.43 Set meander post on south side of lake.
Lake bears N. E. and S. W., made mound of earth and sod pit 8 links south.

59.31 Set meander post on north side of lake.

80.00 Set post corner to sections 19, 24, 25, and 30.
Made mound of earth and sod pit 8 links south of post.
Corner in swamp.
Swamp from corner bears E. and W.
Prairie level soil 1st rate, growth grass and weeds."
(Record pp. 120-121.)

From this it appears that the surveyor in 1855 going north from the southwest corner of section 30, a distance of 16.42 chains "set meander post on south side of lake;" and 59.31 chains north "set meander post on north side of lake;" the difference between these two distances, 42.88 chains, or 171.52 rods, shows the width of the lake on the west line of section 30. There was then a lake at that point more than half a mile across measuring from south to north.

The subdivision of township 97, range 34, was made two years later. Beginning July 25, 1857, and completed July 31, 1857.

As to the south line of section 31, the accompanying field notes are as follows:

"West random between sections 30 and 31 var. E. 10° 53'.

74.92 Length of line between sections 30 and 31.
East corrected between sections 30 and 31 var E. 10° 44'.

37.40 Scattering timber bears N. and S.

34.92 Set a quarter section post.
Bearings: Bur O. 10 S. 63 W. 36
Do. 10 N. 53 W. 46

45.00 Leave timber bears N. and S.

64.42 Lake marsh. Set a meander post in mound of turf, Pit E. 8 links.

74.92 Section corner.
Surface level, soil 3rd rate timber oak."
(Record p. 121.)

These field notes show that the north meander line of plaintiff's land, lots 2 and 3, was actually run out and measured, and courses at distances of such meander lines are given. It extends from meander post on the west line of section 30 to like post on the south line of section 30 near southeast corner of the section. (See Record p. 113.)

The other field notes, accompanying the plats of survey of the east and north lines of section 30, are found in the record at page 56. They correspond with the plats, Exhibits E. and F (Record p. 11) and show the whole eastern line of the section to have been meandered on section 29, and that the north line aside from 13.63 chains of the northwest corner of the section was a theoretical line not run out or measured because of the intervening lake at that point. It was of this survey and plat that the Secretary of the Interior said under date of March 8th, 1898, ordering a resurvey:

"From the official plat of said township it appears that the lake extends into four townships, viz: Townships 96 and 97, half a mile to a mile and a half in width." (Record p. 75.)

And of the resurvey under which defendants claim, the

Secretary said, under date of June 25, 1898, approving such resurvey,

"With his report Mr. Barber submitted a plat showing that the land in question is mostly agricultural in character, *with a wet, marshy pond, called Mud Lake, covering portions of sections* 25 and 30, with an outlet going west into Trumbull Lake." (Record p. 76.)

The plat thus submitted by Mr. Barber is defendant's Exhibit 2 (Record p. 73). It shows a lake or pond on section 30 and depicts its actual margin. It shows the lake to be practically ½ mile wide at the west line of section 30, precisely the same as the original survey of the exterior township line made in July, 1855. At the west line of the section and township this lake adjoins the northwest corner of plaintiff's meander lots. North of these meander lots, going north, the margin of the lake runs slightly northeast practically to the middle of the section, thence turning east it runs close to the middle line of the section until its geographical center, whence it runs northeast to within about 40 rods of the northeast corner of the section. At this northeastern extremity of the lake the lake-bed is depicted on the plat as narrow. The accompanying field notes, Exhibit 3 (Record p. 80), say of this northeastern point of the lake "open water of the inlet 50 links wide, thence on solid flat." The bed of the lake, therefore, at that point is depicted by Mr. Barber as two rods wide.

These same field notes say of the bed of the lake at the west line of section 30, "Margin of water. Coarse grass, weeds, fences and muskrat houses *all over Mud Lake* showing uniform shallow water and level bottom. Estimated depth, 1 to 1½ feet." (Record p. 80.)

And regarding Mud Lake at the very time of the resurvey the field notes state

"Proceed to the outlet of Mud Lake in sec. 25 and set instrument in graded road near bridge. Telescope is 9·05 ft. above water level of Mud Lake and 9·02 ft. above bottom of dry run or natural ditch 2 to 5 ft. wide on west side of road. Hence a rise of 7 inches *in the pond* would cause water to flow in said outlet, westward and a rise *of two feet would cover the broad, grassy flat on each side of it west to Trumbull Lake.*" (Record p. 81.)

The field notes of this resurvey also show that on the east line of section 30, 45 chains or 180 rods south of the northeast corner Mr. Barber found a well-defined beach. With reference to this point the field notes read: "Leave flat ascend beach 45 feet." (Record p. 81.)

The defendant, Hemphill, testifies in regard to Trumbull Lake mentioned in the field notes of the resurvey:

"I am somewhat acquainted with Trumbell Lake and with the outlet of Mud Lake into Trumbull lake. Mud Lake

is higher than Trumbull Lake. The outlet of Trumbull Lake is in the Sioux River. * * * * It is about half a mile from Mud Lake to Trumbull Lake." (Record p. 85.)

"The Sioux River is about 12 miles from Trumbull Lake." (Record p. 86.)

"That was the general fishing ground in the spring of the year, the outlet between Trumbull and Mud Lake." (Record p. 88.

"We generally fished on Trumbull and Palo Alto Lake. Generally followed the outlet of Mud Lake and fished along there." (Record p. 90.

M. S. GREENE testified for plaintiff:

"Have known Mud Lake since 1871. (Record p. 14.) Have seen the lake two feet higher than it is now (at time of trial in 1890). That was in 1878. There were no weeds and rushes in the Lake proper at that time. (Record p. 15.) * * * * Trumbull Lake is larger and covers a good deal more surrface than Mud Lake, and is a deeper lake. * * * * Trumbull Lake is in Clay County, about a mile and a half from Mud Lake." (Record p. 16.)

JAMES SPAULDING testified for plaintiff:

"I am 60 years old. Live 1½ miles east of Schlosser. Since 1872. Have seen Mud Lake frequently; crossed it on the ice; a sheet of water when I came there in 1872; a mile and a half long and sixty rods wide. Water was two feet higher then than now. Same stage of water kept up pretty well until five or six years ago. There was pond lilies and rice pretty generally growing over the lake. Have caught fish there myself. Have seen the water wash up to the trees along the point that projects into the lake two or three times. (Record p. 16.) The water that comes over section 30 starts on section 36 in Clay County on the south and runs to about 40 yards of the east section line in section 30 in Palo Alto County. (Record p. 17.) The fact is, the only change I have seen there is the country in general is getting dryer; cultivation of the soil and breaking it up absorbs the moisture. (Record p. 19.) There are springs in the lake; one near the east end of the south side out beyond section 30; one on section 20 near Lee Hemphill's; one on section 29 near Alexander Hemphill's; one out in the lake where Schlosser piped from when the lake was dry. He had a tank there on the west side; the outlet of the spring is in the lake." (Record p. 20.)

FRANCIS FITZGERALD testified for plaintiff:

"I am 63 years old. I live 20 rods west of Mud Lake in Clay County, and 1½ miles from Schlosser; came to Clay county in 1871. * * * * The land on the east of the plat marked

'lake' was covered with water in an early day; of late years it is a good deal drier. (Record p. 20.) The depth of water varies at different times of year. I think it has been four or five feet in early days. (Record p. 21.) I think the lake is a mile and a half square at the present time. Is has an outlet at high water. There are some springs; the principal one is in Clay County north of Schlosser's house; I don't know of any other." (Record p. 22.)

NICHOLAS RICE testified for plaintiff:

"In 1882 the water was pretty high. The fore part of the summer it was up in the trees; remained there until in August before it went down. It did not go down below the roots of the trees. It collected along there until it froze up that year. From 1882 to 1890 it averaged along about a rod from the roots of the trees. The portion southwest of the island was generally covered with water up to seven or eight years ago. The eastern portion of the half section was generally covered with water in the spring that receded toward fall. (Record p. 22.) From 1882 to 1890 the body of water which has been indicated as the lake proper was a nice, clear lake. There was practically no weeds or grass in the center of the lake. A few patches around the edges. (Record p. 23.) As the country around becomes cultivated and absorbs the moisture the lake dries up." (Record p. 25.)

J. CROOKSHANK testified for plaintiff:

"Age 69 years Have known Mud Lake since 1868. Have been acquainted with it since that time, and have seen it frequently. (Record p. 25.) There was water all over th south and southwest of the island, and between the island and Schlosser's land in 1868 when I first saw it. I think it was a part of Mud Lake. It was connected with the upper part of the lake. There was no bar between the island and pond at that time. It was all a clear body of water. Could not go from Schlosser's land across to the island in the summer time. * * * * I should judge the water was one or two feet lower now than when I saw it in 1868. Mud Lake is about 1½ miles long, and it might be 80 rods wide. * * * * Mud Lake has been from five to six feet deep to dry. (Record p. 26.) The deepest part of Mud Lake is along the County line. The deepest hole is in Clay County across the line. It is quite a considerable deeper than in section 30. * * * * There is no material difference between the east half of the south half of section 30 and the other portion of the south half of section 30; one dries up about as quick as the other. (Record p. 27.) Mud Lake has two inlets; one from the north comes from the northwest, and one from the southeast. The largest inlet is the northwest one. They drain maybe five or six sec-

tions; I don't really know how far north it does go. (Record p. 29.) The land is dryer and solider than it was in 1868; cattle can travel over it; the banks are about the same; the sand ridge between the marsh and Lost Island Lake is about two rods wider. I am guessing at that. Schlosser's land is northwest of the beach. (Record p. 30.) I would say that the sand ridge has widened about two rods. In my judgment the ice shoved up to the bank like, shoving up a lot of sand, and the wind has caused it to widen. (Record p. 155 Amendment.) In my best judgment the bar lying between the swamp and Lost Island Lake has been formed by the action of the ice for successive years." (Record p. 30.)

JOSEPH HANSEN testified for plaintiff:

"I have lived in Clay County since 1881. Have observed the lay of the land and water in the south half of section 30, township 97, range 34, since 1881. It looked like a clear body of water at that time. (Record p. 30.) Q. Do you know of any inlet coming into Mud Lake from the northeast? Yes, sir. Q. Do you know what extent of country it drains in there? A. It drains into what they call Twelve Mile Lake, I think seven or eight miles to the northeast. I have been there, but I could not tell how large a body of water Twelve Mile Lake is. I could not say that it is the outlet of that lake that runs into the inlet to Mud Lake. I know it did drain from up that way." (Record p. 115.)

J. K. OLIVER testified for plaintiff:

"I have lived in Clay County since the fall of 1871. Two miles from Mud Lake. I got timber there in the winter of 1871 and 1872 from John Anthony. I do not know anything about the lines. but I got it on what is known as the island. There was an impassable channel between his land and the island. * * * * There was a sheet of water over west there. I call it a lake just the same as Elbow Lake and Lost Island Lake." (Record p. 31.)

LEROY GROUT testified for plaintiff:

"Age 60 years. Residence Emmettsburgh, Iowa. Civil Engineer and County Surveyor, Palo Alto County, Iowa, for 26 years. In April, 1893, I made a survey of the south half of section 30, township 97, range 34, and made a plat of the survey. Exhibit "G" is the plat. It is a true and correct plat of the south half of section 30, and shows the high lands and meander lines and section lines and half section lines." (Record p. 12.)

EXHIBIT "G."

Offered in evidence. It appears in the Record at page 12.

"I had the government field notes when I made the survey. It was impossible to trace out the south half of the section and meander of lots 2 and 3 accurately. I approximately found the location of the meander lines from the field notes. The red lines is supposed to show the meander line of lots 2 and 3. I found the southwest corner of the section. There was no meander corner visible. I located a temporary meander corner on the west line of this section. It is right on the shore of the water called Mud Lake. There was more or less water there, as the ice had about gone out. It was slush ice on the surface. There was a bank of earth and rocks the same as are found on the shore of most all our lakes. The white portion of this plat represents land not covered by water or bog. The blue portion represents lake and bog, that is water and bog; the dotted portion represents water and grass. The eastern portion of the half section was wet, boggy land. We could not get across at that time. The portion north of the line marked in red ink indicating the meander line, the white irregular point, is practically covered with timber and brush. At that time this was surrounded on the east, north and west by slush and water.' (Record pp. 12 and 13.)

"This point was mostly surrounded by water and marsh land. * * * * I could hardly state intelligently about the body of water, it was about one-half mile across. I have drawn on the plat a square to indicate where Schlosser's house is located; I can not say that that is the exact location. The land immediately north and west of this point is marshy and boggy and both times I was there it was covered more of less with water. East the land is boggy, and in a wet season is difficult to get over. Lost Island lake is south of this 20 or 30 rods. I made no observation as to whether or not at one time Mud Lake was connected with Lost Island lake *only from the field notes*. A sand bank separates them and has ever since I first saw it." (Record p. 13.)

"There are about 23 acres in this point on the northwest corner of the south half. There are about 19 acres of dry land in the island. I have been in this county 26 years and am quite familiar with the lakes. I first noticed Lost Island lake and lakes in that vicinity in 1876. I think the water has been receding since that time in all the lakes." (Record p. 13.)

"I was on the land and made a survey for Hemphill in May a year ago. There was more water then than when I made the first survey." (Record p. 13.)

GEORGE SCHLOSSER testified on his own behalf:

"I first visited the south half of section 30 in 1889, the spring of the year; I was hunting, found plenty of water for ducks right back of the house on the blue land, as represented by plat Exhibit G; out west and north was a clear body of water. There was a body of water there running nearly clear across the section. It covered over half a sebtion . There was no weeds growing up in the water. I went on the water with a boat shooting ducks. The shore line around the timber point is well defined. The water backed up north of the house. I bought the land in 1892, lived on it two years before I bought it. The first year I fenced the timber and some of the south-west corner; built it out in the water some; that was in 1890. Waded out about three feet. In the spring of 1892 it got dry so you could walk across, as shown from A to A. Last year there was water all over the low piece here; the cattle nearly drowned. That portion of the land marked in blue on plat G had water all over it. It came right up to the roots of the trees. There is a spring up near the county line. It took 240 feet of inch piping to hold the water piped out to it to get the water to the shore. There is a vein of water comes out there as big as my arm. Before I put in my tank we had to run the cattle down to Lost Island lake to water them. After I got in a tank we watered 110 head of cattle there. The Beatty boys had two springs up on the north half of section 30. They could water 100 head of cattle during a dry year. The inlet comes in in a northeasterly direction. It draws from what we call Twelve Mile lake; drains the whole country. Twelve Mile lake must be eight miles from Mud lake; has probably two or three hundred acres in it. Mr. Given always talked to me as though he claimed all the land in the south half of the section. Claimed that all that land belonged to my lots 2 and 3." (Record pp. 32-3.)

"I treated it as mine up to the time these squatters commenced squatting on it. * * * * There is a sort of raise right across from A to A. The ridge does not run quite across; there is a raise about half way or two-thirds until you strike a sand bar that runs out in the lake; seems to be a channel that raised up there. The lake extends around to the bar. " (Record p. 33.)

"It runs on the south half in here." (Record p. 116.)

"I moved on the land in 1890; used all the south half of section 30 outside of the water. The water backs over the rest of this that is marked blue on the plat Exhibit G. Whenever there comes a freshet in the spring of the year before the frost is out the water always comes out of the main lake and backs up over the bottom; that was the condition when Exhibit G was drawn. There was more water when Exhibit G was drawn than when the photographs were taken." (Record p. 33.)

SHORE OF LAKE.

LEROY GROUT:

"There was a bank of earth and rocks the same as are found on the shore of most all our lakes. (Record p. 12.) On the east (from the point) it was not as well defined all around if I can remember. On the east shore was low and willows and marsh grass on the shore. Upon the extreme north side it was somewhat higher." (Record p. 13.)

M. S. GREENE took photographs showing shore line:

"The soil between the trees and water as shown by Exhibit 'M" (See Record p. 101.) is stone and gravel, no vegetation; as shown by Exhibit 'N' it is not so stony or gravelly. As shown by Exhibit 'J' it is a dark muck of land. There is a very good bank I think." (Record p. 14.)

This witness also testified that photograph, Exhibit "K" (Record p. 100) correctly shows the shore line.

FRANCIS FITZGERALD:

"Have been on the point of timber frequently. Have examined the shore line on the west side. Raises abruptly from the water. I think slants slightly; gradual slope. Quite a number of trees along the bank six to twelve inches in diameter. They are four or five rods back from the water now. The beach between the water and trees is gravelly close to the bank. Further out it gets muddier. The roots of the trees along the shore line are exposed, I presume by the washing of the water against them. I have seen the water wash up against them. Not in late years." (Record p. 20.)

"Mud Lake has well defined banks along the west and south part in Clay county and in Palo Alto county about a mile. Q. That is true of a greater part of what is known as Mud Lake, it goes gradually into a marsh, instead of having any well defined bank? A. Well, no, there is a good big part of it has a well defined bank, probably two-thirds of it, maybe not that much: I can't tell, I never measured it." (Record pp. 144 bottom, 115 top.)

NICHOLAS RICE:

"The southeast of Mud Lake has well defined banks. The north and northeast portion of the timber point of 23 acres on the west side of the half section is a well defined bank. North of Mr. Schlosser's house is a well defined bank. (Record p. 22.) Exhibit M I should say represents the shore line west of the point Exhibit N represents the same point south taking in a portion of the west shore." (Record p. 23.)

JOHN CROOKSHANK:

"Have set muskrat traps around the point of timber. From the point south-easterly to Schlosser's house was a well defined shore line. There is no well defined shore line where the check marks are, it is marshy, weeds and rushes. Q. South of this body marked lake, lying between tht island and Schlosser's land what is the character of the shore line where it is marked timber? (See Exhibit G, Record p. 12.) Is it abrupt or gently sloping? A. Well, pretty steep, a pretty steep bank along there. At the point marked No. 1, where the arrow is it is sloping gradually. It is a well defined shore line north of the point marked timber south-westerly along the lake, except there is gaps like through the bank and a low place along there. There is willow trees along the shore line. When the water is up it comes right to them. The beach from the water line to the trees is gravelly. There is quite a little timber until you get down to the marsh like and then it gives out." (Record p. 26.)

JOSEPH HANSEN:

"Have observ d the lay of the land and the water in the south half of section 30, township 97, range 34, since 1881. It looked like a clear body of water at that time. In 1884 or 1885, I observed the shore line along the timber point, it was a well defined shore line. The water was pretty well up to the roots of the trees. It has receded from the trees 12 or 14 feet. The beach is gravelly and stony. North-east of the t'm'ber point it is the same. To the north-west the bank are a little more abrupt and higher. As you come down east of the tract it is inclined to be boggy and marshy." (Record pp. 30-31.)

RECESSION OF THE LAKE.

At the time section 30 was surveyed in July, 1857, and sub-divided as to lots 1, 2, and 3, the field notes already referred to show that all the balance of the section was submerged. The whole east side of the section was then under water as shown by the meander lines on section 29 immediately east of section 30. (See Exhibits E and F, Record p. 11.)

J. T. PAINTER testified for the defendant:

"I was in the south part of the state in 1857; came to Iowa in 1855. In 1857 there was a very heavy snow; extremely heavy. That was the spring of the Spirit Lake massacre. The last of the snow did not go off until April. (Record p. 54.)

"I do not know how it was in 1857 *when the survey was made*; except the Island and the point it might have been covered by one continuous body so far as I know; it could not have

been in 1855, because 1855 was an exceedingly dry year. The township range was surveyed in 1855; the sub-divisions in 1857. 1857 was a more wet year and it might have covered a large portion of it." (Record p. 53.)

LEROY GROUT, County Surveyor, testified:

"I have been in this county 26 years, and am quite familiar with the lakes. I first noticed Lost Island lake and the lakes in that vicinity in 1876. I think the water has been receding since that time in all the lakes. (Record p. 13.)

M. S. GREENE, testified;

"Has the water in Lost Island lake receded from where its stage was when you first saw it? A. I should think three feet or so. I think it commenced to fall in 1887. Would recede one year and the next would raise some. I am acquainted with Trumbull Lake and all the lakes in that locality. I know that Trumbull lake has been dry in the last six or seven years. Until that time it looked to me like quite a deep lake. They run a sail boat on Trumbull Lake, I think, in 1874. It has well defined banks." (Record p. 15.)

J. K. OLIVER testified.

"When I came here, after 1872, we kept having a succession of rainy seasons and the water raised in Lost Island lake; that kept up seven or eight years; then the water in Lost Island lake began to recede; that kept up two or three years; then it began to rain heavier than ever. The outlet was impassable for stock until seven or eight years ago; it has been constantly receding from that time up to the last two or three years; this fall they are higher than they was before." (Record p. 31.)

M. L. PARR, testified for defendant;

"All the lakes up north there, Lost Island lake and all the other lakes were higher 20 years ago than in later years; Lost Island was 3 or — feet higher, Mud Lake correspondingly higher." (Record p. 46.)

The field notes of the Barber re-survey, under which plaintiff claims, show, as already referred to, that at the time of the re-survey,

"A rise of 7 inches in the pond would cause water to flow in said outlet, westward, and a rise of two feet would cover the broad grassy flat on each side of it west to Trumbull Lake." (Record p. 81.)

RE-SURVEY.

The records show that May 2nd, 1898, Palo Alto County entered into a contract with Mr. E. B. Evans,

"Authorizing E. B. Evans to represent the County in applying for a survey and selection of swamp land, in sections 29 and 30, township 97, range 34, and providing for a compensation for his services of an undivided one-half interest to all swamp lands patented to Palo Alto County." (Record p. 89.)

Thereafter, under date of June 25, 1898, the Secretary of the Interior approved a re-survey of the land in controversy in section 30. (Record p. 75, Exhibit 26.) Mr. Evans assigned his contract to the defendant, Hemphill, (Record p. 90) and executed to Hemphill, a quit claim deed of the land in controversy as to Hemphilll, being lots 11, 14 and 15 of the south half of section 30. This deed was dated August 23rd, 1898. (Record 90, Ex. 40). These three lots were under the re-survey, certified and patented by the Land Department of the State of Iowa as swamp lands. The State of Iowa issued a patent for them to Palo Alto county. Palo Alto County made a contract of sale for them with the defendant, Hemphill. (Record 86, Exhibit 35.) Hemphill thus acquired whatever title Evans and Palo Alto County might have under the re-survey and the swamp land patents for these three lots.

The south boundary line of the lots thus claimed by defendants, Ryan and Hemphill, purports—according to the plat of the re-survey (Record p. 73, Exhibit 2)—to be the meander line of plaintiff's lots 2 and 3 and cover the entire north front of that meander line. According to the field notes of the re-survey, as testified to by Mr. Grout, "Civil Engineer and County Surveyor of Palo Alto County, Iowa, for twenty-six years." (Record 12.) and he is not contradicted; the re-survey "runs in the timber back of Schlosser's house about fifty feet from the bottom of the bank along slough or lake; it runs about thirty rods on the slope of the bank taking in a part of Schlosser's timber. As near as I could determine when I tried to run the original meander line it would run through the slough quite a ways north of that. My computation of the number of acres left to Mr. Schlosser by Barber's survey (re-survey) would be 98.50. (Record p. 92.) The patent under which Schlosser claims calls for ninety-nine acres and eighty hundredths of an acre." (Record p. 120)

The decision of the Supreme Court of Iowa confined Schlosses to the meander line of his lots, and refused him all relief as stated supra, and he sued out from this court the writ of error herein to review that decision.

ASSIGNMENT OF ERRORS.

Plaintiff in error says there is a manifest error upon the face of the record in the decision and judgment of the Supreme Court of Iowa, in the following particulars:

1. Under the laws, statutes and decisions of the United States the meander line is not the boundary line of lots sold by the United States, but is run for the purpose of conforming to the irregularities and sinuosities of creeks and lakes for the purpose of ascertaining the amount of land for which the Government charged upon the sale thereof.

2. The Court erred in holding and deciding in its said opinion and decision that plaintiff in error was not the owner of the real estate involved in said controversy.

3. The Court erred in construing the laws of the United States not to convey title under the patents issued to plaintiff's grantor to lots two and three of section 30, township No. 97, range No. 34, west 5th P. M. Iowa.

4. The Court erred in refusing to follow the decisions of the Supreme Court of the United States in construing the statutes of the United States as applied to meander lines.

5. The Court erred in refusing to follow the decisions of the Supreme Court of the United States in construing the statutes of the United States as applied to lands included in patents issued by the Un ted States.

6. The Court erred in holding that a new survey of the lands in controversy could affect plaintiff's title acquired by patent from the United States, dated October 10th, 1874.

7. The Court erred in holding that there was any authority of law under the statutes and Act of Congress authorizing a re-survey or further survey of land under the facts disclosed in this case.

8. Under the statutes and various acts of Congress in relation to surveys and sales of the public domain, the original survey as disclosed in this case, and the sale by the Land Department of the United States, and the patents issued by the United State in pursuance of such sale, conveyed title to plaintiff's grantor, and plaintiff, by mesne conveyance from such grantor, took title to the land in controversy, and in said judgment and decision, the Supreme Court of Iowa erred in refusing to establish and quiet the title of plaintiff in error thereunder. (See Record p. 131.)

9. The Court erred in holding that at the time of the government survey there was no lake "proper" or "necessary" to be meandered, and erred under the pleadings in assuming to decide such issue, thus depriving plaintiff in error of his right and title to the land in controversy as specially claimed and set up by him.

10. The Court erred in holding that the meander line of the lots of plaintiff in error was not correctly run, and erred under the pleadings in attempting to decide such issue, thus depriving plaintiff in error of his title to the land in controversy, or any part thereof, as the same was specially set up and pleaded by him.

11. The Court erred in deciding that the land in controversy was not surveyed until the year 1898.

12. The Court erred in holding that the swamp land title could be asserted against the right and title of plaintiff in error after a delay of nearly forty-eight years on the part of the State of Iowa and Couuty of Palo Alto in asserting the title or claim to any portions of the land in controversy under the swamp land grant.

13. The Court erred in holding that the right or title of plaintiff in error to the land in controversy could be in any manner affected by the resurvey ordered and made in the year 1898.

14. The Court erred in holding that the claim of defendant Hemphill under the Swamp Land Grant was not barred by lapse of time and by the possession of plaintiff in error, and those under whom he claims title.

15. The Court erred in holding that defendant Ryan was entitled under the survey of 1898 to enter and hold lots 12 and 13 under the homestead laws of the United States.

16. The Court erred in holding that the title and right of defendant Ryan to lots 12 and 13 of the survey of 1898 was superior to that of plaintiff in error.

17. The Court erred in holding that the right and title of defendant Hemphill to lots 11, 14 and 15 of the survey of 1898 was superior to that of plaintiff in error.

18. The Court erred in denying the title of plaintiff in error to lots 11, 12, 13, 14 and 15 under the survey of 1898, and in denying his right and title to each of said lots under the government patent to Anthony, his remote grantor.

POINTS OF LAW AND FACTS..

I.

THE CONTROVERSY.

Plaintiff in error claims title to the south half of section 30, township 97, range 34, under patent which conveyed to his remote grantor Lots 2 and 3 of that section "containing ninety-nine acres and eighty-hundredths of an acre, according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General." (Record p. 120.) The two lots extend nearly across the south end of section 30; the balance of the section except the small lot in the north-west corner was meandered out and not fully sub-divided by the original survey of 1855 and 1857. (Exhibits E and F, Record p. 11.)

The official survey shows that a lake lay north of the meander line of plaintiff's lots. (See field notes, Record 56-7, 113, 120.) North of the meander line, and between it and the actual shore

of the lake were about one hundred acres of land. (See opinion ofcourt below, Record p. 126.)

Plaintiff in error claims:

1. That the patent under which he claims gives him the dry land between the meander line and the lake. (See his petition, Record pp. 1 and 2.) This claim was rejected by the court below upon the ground that there was no lake "proper to be meandered." (Record p. 127) and upon the ground "that the meandered l ne was not correctly run in the first instance." (Record p. 128.) The pleadings show that no such questions or issues were presented or raised for determination. (Record pp. 1 to 10.)

2. Plaintiff also claims that the patent of his remote grantor gives him title to the entire south half of section 30. (Record p. 1.) This claim depends upon whether or not the patent under which he claims conveyed title to the center of the meandered lake.

The court below denied his claim of tit e in this behalf and confined him to the meander line of his lots. It did not expressly pass upon the question of title to the bed of the lake, but denied relief to plaintiff in error upon the above stated grounds that the lake was not "proper or necessary to be meandered," and that the meander line was not correctly run. (See opinion, Record pp. 126 to 128.)

Defendant Ryan claims under the homestead laws of the United States and under the re-survey of the part of section 30 meandered out by the original survey of 1857. (See his answer, Record pp. 2, 3 and 4, Amendment to answer, Record p. 8.)

Defendant Hemphill claims title to a portion of the land in controversy under the same re-survev and patents to the State of Iowa and Palo Alto county under the Swamp Land Grant. (See his answer, Record p. 6, and Amendment thereto, Record pp. 9-10.)

Plaintiff in error by reply and in avoidance of these claims of defendants sets up that the re-survey was unauthorized and void, and did not affect his title; also adverse possession and the bar of the statute of limitations. (See replies, Record pp. 7, 8, 9, 10, 111 and 112.)

II.

BEDS OF NON-NAVIGABLE LAKES IN IOWA.

The Supreme Court of Iowa, as to riparian owners, under government patents, never has decided the question of the title to beds of non-navigable lakes. The following are its only decisions which have any bearing on that question. They do not decide it.

Noyes vs. Collins, 92 Iowa, 567-8-9.
Noyes vs. Supervisors, 104 Iowa, 175.
Rood vs. Wallace, 109 Iowa, 8-11-13-14.
Grant vs. Hemphill, 92 Iowa, 218.
Schlosser vs. Cruickshank, 96 Iowa, 37.
Ladd vs. Osborne, 79 Iowa, 93.
Ogden vs. Buckley, 116 Iowa, 357.

This Court will not be guided on this question by *dicta* of the Supreme Court of Iowa, nor by what it may have said *arguendo.*

Hardin vs. Jordan, 140 U. S., 385 and 387.

III.

AS TO MUD LAKE.

In the case at bar the Court below having grounded its decision upon the supposititious issues that the lake "was not proper" or "necessary" to be meandered, and that "the meander line was not correctly run in the first instance" did not decide that Mud Lake was not a permanent body of water. On the contrary, the opinion recognized it as permanent. (Record pp. 126-127-128.) The Record shows that the lake is permanent. (See letters of ~~Commissioner~~ Secretary of the Interior, (Record pp. 75 and 76.) And see field notes of re-survey, (Record p. 81.) Also testimony of defendant, (Record p. 85;) of Greene, (Record p. 16.)

Plat of Barber's re-survey, Exhibit 2, Record 73.
Testimony of Painter for defendant, Record p. 42, and his plat, Exhibit 21, Record p. 44.

See also testimony of witnesses, *supra,* in statement of case and especially under titles "Banks of Lakes" and "Recessions of Lakes."

The year 1857, when the government survey was made, was a wet year. (Testimony of Painter for defendant, Record 534.) The field notes of the re-survey of 1898 show that "a rise of seven inches in the pond (Mud Lake on section 30) would cause water to flow in said outlet westward, and a rise of two feet would cover the broad, grassy flat each side of it west to Trumbull Lake." (Record p. 81.)

The plat of the survey of 1857 (Exhibits E and F, Record 11) are conclusive as to the meander lines.

U. S. vs. Vallejo, 1 Wall, 660.
Live Stock Co. vs. Springer, 185 U. S., 51, 52 and 54.
Smelting Co. vs. Kemp, 104 U. S., 641.
Russell vs. Maxwell & Co. 158 U. S. 253.

"If there was a lake abutting on the north of the lots, plaintiff in error would take the land between the meander line and the water, and all accretions."

Live Stock Co. vs. Springer, 185 U. S. 54.

The plat and survey are to be taken as a part of the patent.

Hardin vs. Jordan, 104 U. S., 371.
Niles vs. C. P. Club, 175 U. S., 306.
Chenowith vs. Haskell, 3 Pet., 96.
White vs. Burnley, 20 How., 248.
Brown vs. Clements, 3 How., 671.
Hardin vs. Shedd 190 U. S., 520.
Cragin vs. Powell, 128 U. S., 691.
Jeffries vs. East Omaha Co., 134 U. S., 194.

The land under water was covered by and embraced in the survey of 1857.

Kean vs. Calumet Co., 190 U. S., 460.
Hardin vs. Jordan, 140 U. S., 371.
Mitchell vs. Smale, 140 U. S., 406.
Kean vs. Roby, 145 Ind., 221.

The meander line is not a boundary and does not limit the title of a riparian owner. He takes to high water mark of navigable water, and at least that far on non-navigable water.

Schlosser vs. Cruickshank, 96 Iowa, 549.
Kraut vs. Crawford, 18 Iowa, 549.
Musser vs. Hershey, 42 Ia., 356.
Steel vs. Sanchez, 72 Ia., 68.
Ladd vs. Osborne, 79 Ia., 95.
Grant vs. Hemphill, 92 Ia., 218.
Case at bar, Record 126.
Hardin vs. Jordan, 140 U. S., 380.
Horne vs. Smith, 159 U. S., 45.
Railroad Co. vs. Schurmeir, 7 Wall., ~~43~~ 213.

IV.

THERE IS NO ISSUE AS TO WHETHER THE LAKE WAS "PROPER" OR "NECESSARY" TO BE MEANDERED, NOR WHETHER THE MEANDERED LINE WAS CORRECTLY RUN.

The issues tendered by the answers were:

"As to whether said lots were meandered, defendant has not sufficient knowledge to form a belief, and denies the same. The defendant denies that such meander lines were run with

reference to a lake then existing in part upon section 30." (Record pp. 2 and 6.)

Whether the lake was "proper or necessary to be meandered," and whether the "meander line was not correctly run," was clearly matter in avoidance. It can not be proven unless pleaded.

Under the general denial authorized by the Code of Iowa no affirmative defense can be proved.

Scott vs. Morse, 54 Iowa, 734.
Morning vs. Long, 109 Iowa, 290.

Code of Iowa, 1897, Sec. 3615, reads:

"Under a denial of an allegation no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove."

This, under the Code, applies to both equity and law, and leaves the rule of pleading under the ancient equity practice in full force.

Under the ancient practice the rule of *allegata et probata* is too familiar to require a citation of authorities. Proof without pleading is no better than pleading without proof.

That matter in avoidance must be pleaded and proven by the defendant, see—

Bush vs. Marshall, 6 How., 289.
Clarke vs. White, 12 Pet., 190.
Clements vs. Moore, 6 Wall., 315.

Chancellor Kent shows that this is a rule both in equity and at law.

Hart vs. Ten Eyck, 2 Johns. Ch. Rep., 90-95.

To the same effect, Lord Eldon in,

Thompson vs. Lambe, 7 Ves., 587.
Greene vs. Hart, 1 Johns. Rep., 580.

But if the defendants saw fit to go further, as they had the right to do, and aver additional matter on which they relied in defense, they must prove the additional matter, it being traversed by the general replication.

New England Bank vs. Lewis, 8 Pickering, 119-120.

This Court has distinctly held that failure to aver matter proper in avoidance deprives a defendant of that defense.

Seitz vs. Witchell, 94 U. S., 585.

Proofs without allegations, and allegations without proofs, are alike to be disregarded?

Hunt vs. Daniel, 6 J. J. Marsh, 398.

Proofs to be admissible must be founded upon some allegations in the bill and answer.

Piatt vs. Vattier, 9 Pet., 415.

This case is followed in,

Scott vs. Evans, 1 McLean, 489.
Same case, Federal Cases, 12,529.
Day vs. Hartshorn, 7 Fed. Cases, 240.
Maulding vs. Scott, 13 Ark., 95.
Hackney vs. Butts, 41 Ark., 400.
Keeton vs. Keeton, 20 Mo., 542.
Gross vs. Disney, 95 Tenn., 595.
Same case, 32 S. W. Rep., 633.
Dorr vs. Rohr, 82 Va., 366.

And as to necessity of setting up avoidance in pleadings,

Long vs. O'Fallon, 19 How., 125.

And see.

3 Greenl. on Ev., 15 Ed., Secs. 355-356.

V.

TITLE AS TO BED OF THE LAKE.

The title as to the bed of the lake is a common law question, and at common law the riparian owner takes to center of the lake unless the State courts have established a different rule.

Hardin vs. Jordan, 140 U. S., 371.
Kean vs. Calumet Co., 190 U. S., 452.
Hardin vs. Shedd, 190 U. S., 508.

The Supreme Court of Iowa has not decided this question one way or the other. See its decisions cited *supra*, division V. This Court must decide for itself and must assume that the common law of Iowa as to the beds of non-navigable lakes, is as decided in Hardin vs. Jordan, *supra*, and the cases following it.

This carries the title of plaintiff in error to the center of Mud Lake, or to such portion of Mud Lake less than that as he claims in his petition. What he claims is the south half of section 30. (See petition, Record p. 12.) This carries him just to the center of the lake on the west line of the section, and to less than the center as the half section line is extended from west to east.

See plats of Government survey, Exhibits E and F (Record p. 11.)

Also plat of Barber's re-survey in 1898, Exhibit 2. (Record 73.)

And plat of defendant's witnesses, and surveyor Painter, (Record Exhibit 44), and see facts stated, *supra*, Division "AS TO MUD LAKE," including field notes of survey, and of Barber's re-survey.

For field notes of original survey see Record pp. 121, 113, 56 and 57. For field notes of resurvey see Record pp. 31 and 32.

As to the small island containing nineteen acres (See plat Exhibit G, Record 12; and testimony of witness Grout, Record 13) the plaintiff takes title to this or such portion as lies in the south half or section 30.

St. Louis vs. Rutz, 138 U. S., 245 to 251
Sanford vs. Mangin, 30 Ga., 355.
Kimball vs. Schoff, 40 N. H., 190.
Hardin v Jordan 140 U.S. 384

VI.

THE RE-SURVEY.

The Court below, as shown by its statement of the case, treated the claims of both Ryan and Hemphill as arising under the Swamp Land Grant (Record p. 126), and decided the case under the Swamp Land Grant only. Ryan claimed under a homestead entry made under the re-survey, one hundred and one acres of land between the meander line of Schlosser's lots and the lake. (Record 5, Exhibit E; plat of re-survey 73, Exhibit 2.)

This is the very quantity of land lying north of the meandered lots, and between those and the lake which the Supreme Court of Iowa gave to Schlosser in the prior case of Schlosser vs. Cruickshank, 96 Iowa, 414.

As to this land, it was covered by the riparian rights under the Anthony patent, and no subsequent survey could affect it.

Davis vs. Wiebbold, 139 U. S., 507.
Hardin vs. Jordan, 140 U. S., 401.
Moore vs. Robins, 96 U. S., 534.
Cragin vs. Powell, 128 U. S., 698.
Mitchell vs. Smale, 140 U. S., 406.
Kean vs. Calumet Canal Co., 193 U. S., 453.
Grand Rapids &c. Co. vs. Butler, 155 U. S., 95.
Ry. Co. vs. Schurmeir, 7 Wall., 289.

The case of Mitchell vs. Smale, *supra*, is in point, and is very pursuasive on the facts in the case at bar.

Cases where, under special facts, the meander line is held

to be a line of boundary are distinguishable from the above authorities and from the case at bar. These are

French-Glenn &c. Co. vs. Springer, 185 U. S., 49.
Security Land &c. Co. vs. Burns, 193 U. S., 167.
Niles vs. C. P. Club, 175 U. S., 300.
Hahn vs. Smith, 159 U. S., 41.

VII.

THE SWAMP LAND GRANT.

Under the Government survey and plat the lots shown to be swamp, by the re-survey, were *prima facie* part of Mud Lake, and title passed under the Anthony patent either to the center of the lake or as accretions to the meandered lot if it should be held that Anthony's patent took only to the edge of the lake.

This being so, the Land Department in approving the survey and plats and issuing Anthony's patent thereunder necessarily adjudicated that these lands were not swamp lands.

Erdhardt vs. Hogaboom, 115 U. S., 67-69.
Frazier vs. O'Connell, 115 U. S., 102.
McCormick vs. Hayes, 159 U. S., 347.
Rogers Locomotive Works vs. Emigrant Co., 164 U. S., 573.

The State of Iowa and County of Palo Alto were barred by possession of grantees under the Anthony patent, and by lapse of time and *laches* from selecting the lands in controversy as swamp under the Act of 1850. Their grantee, Hemphill, is equally barred.

McCormick vs. Hayes, 159 U. S., 347.
Rogers Locomotive Co. vs. Emigrant Co., 164 U. S., 573.

Congress, by Act approved March 12th, 1860, provided,

"That the selections to be made from the lands already surveyed in each of the States, including Minnesota and Oregon, under the authority of the Act aforesaid (Swamp Land Grant), and of the Act to aid the State of Louisiana in draining the swamp lands therein, approved March 2, 1894, shall be made within two years of the adjournment of the legislature of each State at its next session after this Act, and as to all lands hereafter to be surveyed, within two years from the adjournment of the next session after notice by the Secretary to the Governor of the State that the surveys have been completed and confirmed."

The next regular session of the Legislature of Iowa after the passage of this Act adjourned April 9th, 1862. The Act required swamp lands in Iowa to be selected and reported by April 9th, 1864. Section 30 was fully surveyed in 1857. The corners of the northwest, southwest, and southeast of that section were all marked by posts set up by the Government surveyor. The northeast corner was marked by a witness corner and post then set. (See field notes, Record pp. 121, 113, and 56.) The quarter section post for the east line of section 30 was set in like manner. (Record p. 56.) This sufficiently indicated where the boundary line between the north half and the south half of section 30 would run. No quarter section post was set on the west line because of the lake.

Palo Alto County and the State of Iowa might, therefore, have selected the swamp lands in section 30 within the date fixed by the above Act of Congress. No action was taken in this respect until 1898. Meanwhile the rights of Anthony and those claiming under his patent had accrued. The plaintiff had purchased lots 2 and 3 relying upon securing thereby the whole south half of section 30. His grantor made the same claim. (Schlosser's testimony, Record p. 33.) And Schlosser occupied the land under this claim, from his purchase in 1892 up to the time of the re-survey and swamp selection. (Ib. Record pp. 32, 33, 34.)

Under these circumstances the swamp land claim of Palo Alto County and its grantee, Hemphill, is clearly barred even if we concede the land to have been swamp in fact.

That adverse possession may avail as against *laches*, see,

Piatt vs. Vattier, 9 Peters, 416.

VIII.

JURISDICTION.

The questions involved are purely as to the legal effect of the Anthony patent under which plaintiff in error claims,

1. As to its effect in giving title to the center of the lake or to the shore of the lake including accretions,

2. As to its effect in giving title superior to that under the Swamp Land Grant.

The Court below did not decide the case on any finding of facts which limited the legal effect of the Anthony patent. The holding that Mud Lake was not "proper" or "necessary to be meandered" was a conclusion of law from the Government survey and from the testimony of witnesses.

The same is true of the holding that the meander line was not correctly run, and that was a conclusion which the

court below was without jurisdiction to decide, for the meander line was conclusive.

Furthermore, as has been pointed out, there was no issue as to these matters in the pleadings.

The decision of the court below in favor of the swamp land title involved no finding of facts limiting the effect of the Anthony patent. That decision was also based wholly upon the rulings that Mud Lake was not "proper" or "necessary to be meandered," and that "the meander line was not correctly run."

The question of jurisdiction has been decided by this Court in two cases precisely like the case at bar.

Kean vs. Calument Canal Co., 190 U. S., 452.
Hardin vs. Shedd, 190 U. S., 508.

In the former of these cases it was pointed out by Mr. Justice White in his dissenting opinion that the question of jurisdiction was involved.

190 U. S., 474-5.

In the Hardin-Shedd case the question of jurisdiction was fully argued both for the plaintiff in error and for the defendant in error, as shown by their briefs with the reported case. (190 U. S., pp. 516-517.)

This Court maintained its jurisdiction in both cases, citing in the Hardin-Shedd case, evidently as to that point,

Mitchell vs. Smale, 140 U. S., 410.
Shively vs. Bowlby, 152 U. S., 10.

The question of jurisdiction must be decided by this Court whether insisted upon or not.

Continental Bank vs. Beauford, 191 U. S., 119.
Defiance Water Co. vs. Defiance, 191 U. S., 184.

In the following cases it was expressly decided that this Court had jurisdiction, and they are in point in the case at bar.

Shively vs. Bowlby, 152 U. S., 9 and 10.
French-Glenn Co. vs. Springer, 185 U. S., 54.

ARGUMENT.

I

The controversy in this case is as to the effect of the patent from the United States under which plaintiff in error, Schlosser, who was plaintiff below, claims title. That patent was issued under homestead law; it was dated October 10, 1874; it covered

lots 2 and 3 of section 30, in township 97, of range 34," containing ninety-nine acres and eighty hundredths of an acre according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General." (Record p. 120.)

The official plat shows that the two lots extend nearly across the south end of section 30. The balance of the section, except a small tract in the north-west corner, was meandered out and was not sub-divided. (Exhibits E and F, Record 11.)

The testimony shows that Lost Island lake—admitted to be a deep and permanent lake—lies on section 31 immediately south of the land in controversy, and the meander lines laid down on the official plat above referred to show an outlet between Mud Lake on Section 30 and Lost Island lake on section 31. The outlet thus depicted is about 40 rods in width. There is evidence showing that there is now a sand bar between the two lakes, pushed up by the action of the ice and the wash of the water. (John Cruickshank, Record 30 and 115.)

The evidence shows without controversy that north of the meander line of plaintiff's lots, and near the north west corner, there is a high point of land—containing twenty-three acres—pushed out into the lake like a thumb. This, it is conceded, has always been dry land. It is a portion of defendant Ryan s homestead entry. The surveyor, in 1857, instead of tracing the sinuosities of this point ran his meander line across the base of it, leaving it outside and north of such meander line.

One question in controversy is whether plaintiff under his patent, and by virtue of it, takes this point of twenty-three acres between the meander line and the lake as well as other dry land between the meander line and the lake.

Plaintiff's claim is two-fold; he claims:

1. That his remote grantor's patent gives him the dry land between the meander line and the lake. This claim was rejected by the Supreme Court upon the ground that there was no lake "*proper* to be meandered." (Record p. 127.)

2. Plaintiff also claims that his remote grantor's patent "includes all of the land embodied in the south half of said section and his title is complete as to all of said land claimed adversely by the defendants."

This claim was also rejected by the Supreme Court of Iowa. It depends upon whether the patent under which he claims conveys title to the center of the meandered lake north of his land.

II.

BEDS OF NON-NAVIGABLE LAKES IN IOWA.

The Supreme Court of Iowa never has decided in whom as to riparian owners under government patents, the title to

the beds of non-navigable lakes in Iowa is vested. Its decisions so far as they bear upon this question are as follows:

In a case decided in 1894 it appeared that

"*Section 15 is a part of the swamp land grant from the United States to the State of Iowa, and from the State to Harrison County.* The lot was conveyed by the County to one Morgaridge and after mesne conveyances the title vested in the plaintiff. What was known as 'Dry Lake' was in part *on section* 15, and was a body of water from five to seven miles in length, and from eighty to one hundred rods in width. Its depth was from three to seven feet. The boundaries of lot number 6 in the deeds of conveyance are as follows: 'Commencing at the south-east corner of section 15, township 80, range 45, and running to Dry Lake, thence south west, by the meanders of said Dry Lake, to the south line of section 15; thence east along said line to the place of beginning,—containing thirteen acres,—more or less."

The question was whether plaintiff, under these circumstances, and under such conveyance, took to the middle of Dry Lake. The Court said:

"It may be conceded as the rule that riparian owners of lands bordering on rivers or steams not navigable, in the absence of a limitation in the title, take to the center thread of the river or stream. A case of such limitation of title is found in Murphy vs. Copeland, 58 Iowa, 409, 10 N. W. Rep., 786. In this State no such rule has been applied to lakes or ponds. 'Dry Lake' —as it was called— was meandered by the Government Surveyors, and nothing in the record indicates that in any of the conveyances of lot number 6 there was any purpose to include a part of the bed of the lake. No such claim is made, urther than the acts of the parties would be affected by the rule of law as to such riparian owners. In Dietrich vs. Railway Co., 42 Wis., 248, it is said: 'The rule that the title of the riparian owner upon a natural lake or pond does not extend beyond the natural shore appears to be very generally—almost universally—recognized.' Our views are generally in accord with the doctrine thus announced. It is not only in harmony with the general adjudications on the subject, but it seems, it view *of the particular fact of this case*, equitable."

Noyes vs. Collins, 92 Iowa, 567-8-9.

It will be seen that in this case the county took the whole of section 15 under the swamp land grant. The boundaries of the deed of conveyance under which plaintiff claimed were such that he might well be confined to the meander line along the lake, the title to the lake itself remaining in the County under the swamp land grant. There is no intimation that the title to the bed of the lake was in the State of Iowa. The case seems to have been decided "in view of the particular facts,"

quite as much as with reference to any rule as to riparian ownership along "a natural lake or pond."

Following this case was one decided in 1897 also involving a claim of title to the same lake as in the case *supra*.

The Court said.

"In the Noyes-Collins case the title to a portion of the bed of this same D.y Lake was in controversy; and it was held, *under the facts*, that the land lying in the lake bed was not an accretion to the land of plaintiff in that case, and that the rule that a riparian owner of land bordering on rivers or streams, in the absence of limitation in his title, takes to the center thread of the streams, does not apply in this state to the case of a lake or pond."

Noyes vs. Board of Supervisors, 104 Ia., 175.)

In this case the Court also said:

"All parties claim through the swamp land grant of 1850. It is admitted that these lakes were never navigable; and it appears without conflict that the defendant county has from time to time, for many years, surveyed portions of these lake beds, has platted the same in lots, and sold said lots to various parties. It is conceded that these lakes were meandered by the general government surveyors in 1851 and 1852, and that they never became wholly dry and their entire beds fit for cu tivation, until along about 1890 or 1891. The county having ordered the remaining unsurveyed portions of these lakes to be surveyed into lots, and caused the same to be appraised and offered for sale, plaintiffs applied for and obtained a temporary injunction restraining the sale of the lots. On final hearing, the injunction was dissolved, and from that decree the plaintiffs appeal."

Ib. pp. 174-5.

It having been decided on the facts in the Noyes-Collins case, that the county held the bed of the lake under the swamp land grant, the only real question was whether it had parted with its title thereto to its grantees. Under the special facts it was held that it had not.

It is obvious that the facts in this case are so peculiar that the decision depends thereon, and not upon any general principle of law. The court is far from intimating that the title to the bed of such lakes vests in the State for any purpose. The statement that a riparian owner does not take title to the center of the lake or pond is dictum so far as settling any general rule of law is concerned.

In 1899 there came before the court a case involving lands originally submerged by Owl Lake. This lake had been partially drained so that the lands in controversy had become fit for cultivation. Plaintiffs claimed the land under the swamp

land grant. Defendants claimed under the homestead and pre-emption laws. The right of riparian owners along the lake were in no manner involved. The State of Iowa intervened and claimed the land upon the ground that the title to the bed of the lake was vested in it.

The State, however, had requested patents for the lands in controversy as swamp land, which request had been complied with and patents issued. Thereupon the State had issued patents to Humboldt County, where the lake was located, and Humboldt County had sold the lands, the plaintiff claiming under its conveyances. Very naturally it was held under these circumstances that the State could assert no interest in the lands.

The Court said in passing upon this question: (page 28.)

"We are quite ready *to assume*, as a general proposit on, that title to all the lake beds in the state, especially *those of navigable lakes*, is in the state; and that the general government never had any control or ownership thereof. * * * * But, when, how, and by whom is the question of whether the land is a *lake bed* to be determined."

Answering that question the Court says:

"There seems to be no doubt that the Secretary of the Interior had the right, *in so far as the parties to this suit are concerned*, to re-determine the question as to whether or not the land in question was a part of the lake bed, or was covered by the so-called 'Swamp Land Act.' This brings us to the next question: What force is to be given the determination of the land commissioner that the land was in fact swamp land, and what effect is to be given the patent issued to the state?"

And as to the effect of a patent under the swamp land grant issued after the Secretary of the Interior has investigated that question, the Court says:

"Whenever question arose as to the character of the land in dispute, it was certainly competent for the governor to submit the matter to the only authority that had original jurisdiction in the matter; and, having so submitted it, that decision is final. If there was no real dispute as to the character of the land,—if, for instance, the property was a part of the bed of any of the *navigable rivers* of this state, or if it was property which *was clearly lake bottom,—it may be* that the governor would not be justified in submitting the matter as to its character to the land department; and if he did so, and the land department found that the land was swampy when surveyed, such conclusion would be null and of no effect. But when there is a fair dispute as to the character of the land when originally surveyed, surely the land department has the right to determine the dispute; and, as a general rule, its decision is binding until set aside by direct attack. The whole case, in our judgment, turns upon the effect to be given the original survey. If that

is conclusive, it amounts to a segregation of the lakes and river beds from the public domain, and, as a general rule, confirms the title thereto in the state. If the survey is not conclusive, but is simply administrative or advisory, then the land department has the right at some future day to determine its character, and cause a patent to issue accordingly. And when this is done the finding is not subject to collateral attack."

Rood vs. Wallace, 109 Ia., 8-11-13-14.

This case in no manner determines or affects the rights of riparian owners. The court was careful to say:

"Purchasers of lots abutting on meander lines or otherwise directly interested, are, it seems to us, the only persons who may object to the resurvey; *and no resurvey will be permitted* which will in any manner prejudice their interests. They, as we have seen, are not made parties to this suit, and are making no objection to plaintiff's title."

Ib., pp. 9 bottom and 10 top.

What the court did decide was

"That the Secretary of the Interior had the right, *in so far as all parties to this suit are concerned*, to re-determine the question as to whether the land in question was a part of the lake bed or was covered by the so-called Swamp Land Act."

It then held

"As the Land Department determined the lands in controversy to be swampy, and issued its patent to the State accordingly, that determination is conclusive, and the patent can not be collaterally attacked. * * * * If the State has no title its petition of intervention should be dismissed without regard to the title under which plaintiff claims."

Ib. p. 12.

And it further held,

"That the Governor of the State had authority to apply for patents to the land to the State under the Swamp Land Grant, and that the State having parted with its interest by its patent to Humboldt County of the land as swamp land, that it could not maintain its petition of intervention for want of title or interest. As to the parties defendant claiming that the lands were subject to entry under the homestead and preemption laws the decree was against them obviously upon the ground that the lands were swamp and passed under the swamp grant."

From this analysis of the case it is obvious that the Court was speaking purely *arguendo* when it said,

"We are quite *ready to assume* as a general proposition that title to all the lake beds in the State, *especially those of*

navigable lakes, is in the State, and that the general government never had any control or ownership thereof."

There was no such question for decision in the case because the holding was that the lands were not a portion of the bed of the lake at all, and were, under the finding of the Land Department, on the resurvey, conclusively found to be swamp land, and it followed that "the finding was not subject to collateral attack."

The State of Iowa attempted to review this decision on writ of error from this Court, but it was here held that the title which it set up did not arise under the Constitution or an act of Congress, and that no federal question was involved. The writ of error was therefore dismissed on motion. This Court said as to the contention of the State that the "Government surveyors in segregating and setting apart the land in question by meander lines from the public land, and the approval of such survey by the Commissioner of the General Land Office" adjudicated that the lake so segregated was the property of the State of Iowa.

"We do not interpret the action of these officers. They undoubtedly did survey the lands adjoining this lake, and meander the lake itself, but they determined nothing as to the title of the land beneath its waters—a determination which would have been wholly beyond their powers."

Iowa vs. Rood, 187 U. S., 93.

The next case (Carr vs. Moore, 119 Iowa 152) involving a lake was decided by the Supreme Court of Iowa in 1903. The body of water, says the Court, was

"What was at one time known as 'Iowa Lake,' claimed to have been a body of water situated in Hamilton County, and in extent about a mile and a half each way, of very irregular outline, with a shore line of over six miles and an area of eight hundred and eighty-five acres. When the government survey of the surrounding land was made in 1849, the so-called lake was meandered, and the two plaintiffs own lots platted by the surveyor as bordering on this meander lake. The bed of the lake is now practically dry land, and plaintiffs claim portions of the bed as having been added to their adjoining lots *by accretion or reliction*, and ask that either the whole bed of the lake be decreed as owned in common by the adjoining proprietors in proportion to the extent of their assumed shore line, or that by lines running from the intersections of their boundaries with such assumed shore line to some point which may be found to be the center of the lake, portions of the lake bed may be set off to them in severalty." (pp. 153–4.)

The defendants claimed title under the swamp land grant and a purchase from Hamilton County. As to this claim the Court said:

"It is enough to say that he (the defendant) does not show any selection of the land by the proper department of the federal government, or recognition by it of the land as passing under the swamp land act. No doubt, the swamp land grant was a grant *in præsenti*, but the passing of the title under the grant depends on a question of fact, which can not be adjudicated by the State and its grantees for themselves. The determination as to whether the land is swamp land must be, in the first instance, by the proper department of the federal government; and, until some determination has been made, the grantee claiming under the swamp land grant has only at best an inchoate right, not amounting to a title. This has been settled in a case recently decided in this Court. See Ogden vs. Buckley, 116 Ia. 352. Under the rule announced in that case, we can not grant to defendant any affirmative relief." (p. 159.)

The Court states in its opinion that

"About ten years after the survey, although previous to that time it had contained water, the so-called lake became practically dry during one season. * * * * It was swampy in character,—the bottom composed of prairie mud and a peaty substance. * * * * It had no springs or other subterranean sources of water supply, nor did it have any definite inlet, * * * *. About fourteen years before the bringing of these suits it became practically dry. At the present time, owing to the cultivation of the surrounding country, the surface water does not drain into it. Some of the witnesses liken it to ordinary sloughs or ponds, save as to its greater extent." (pp. 154–5.)

It will be seen that the question in this case, as stated by the Court, was *whether the plaintiff acquired title to a portion of the bed of the lake "by accretion or reliction."* There was no claim on his part that he took title to the center of the lake, or any portion of the lake, by virtue of the original patent from the Government under which he claimed, together with the survey, plat and field notes with refercnee to which the patent was issued. The Court said as to the claim of accretion or reliction,

"To furnish occasion for the application of the rules of law on these subjects, there must have been in this case a lake, and the addition to plaintiffs' lands must have been gradual and imperceptible." (pp. 155–6.)

"It is enough to say in the present case that there is no evidence of accretion or reliction. It does not appear that the drying up of the water of the lake resulted in gradual and imperceptible increment to the lands of plaintiffs. It is perfectly clear that the water did not slowly recede to a different shoreline surrounding a remoter body of water, which further subsequently disappeared, extending the titles of the surrounding

owners to the center, for the testimony all shows that the lake was shallower in the center than in some of its portions near the original margin line. In short, there is a total want of such evidence as has been held sufficient in the cases on the subject to show imperceptible additions, enlarging the areas of land owned by riparian proprietors. (Citing authorities.)

"The question we are now considering is practically controlled by the conclusion of the Court in Noyes vs. Collins, 92 Iowa 566, which was analogous, save in that the lake was rendered dry within a year by drainage; but the recession of the water from the land was no more sudden during the year during which the lake there considered was drained than it wa in this case when the lake became dry for the last time. The insuperable difficulty with plaintiff's claims, under the doctrine of accretion or reliction, is that there is no evidence to support them. See Hodges vs. Williams, 95 N. C. 331 (59 Am. Rep. 242.)

"From what has already been said, it is apparent that there was at the time of the original survey no lake, in the proper sense of the term, such as to give occasion for the application of the doctrines of accretion and reliction." (pp. 156–7.)

This decided the whole case before the Court. The trial court had refused relief to either party, and had dismissed the petition and cross petition of each. Its decision was affirmed.

But the Court considered other questions. As to its ruling above quoted, that there was "no lake in the proper sense of the term," it said:

"But it is contended for plaintiffs that the character of the body of water was determined by the surveyor in meandering it, and that the approval of his survey by the United States Land Department constituted an adjudication which can not now be questioned." (p. 158.)

And as to this contention, the Court said:

"We have held that if, by evident mistake on the part of the surveyor, a meander line is run where there is no body of water *proper* to be meandered, the title of the owners of lots or fractional subdivisions on the meander line does not extend beyond. Schlosser vs. Cruickshank, 96 Iowa 414; Schlosser vs. Hemphill, 118 Iowa 452. As to whether the land within the meander lines is swamp land or not is not conclusively settled by the act of the surveyor. Rood vs. Wallace, 109 Iowa 5. And in general, to the effect that the running of the meander line does not conclusively establish the character of the area beyond the meander line." (p. 158.)

"We conclude, therefore, that the original government patents to the lots now owned by plaintiffs did not confer any ownership beyond the meander line, and that the tracts of land thus conveyed by the government have never been extended

by accretion or reliction so as to include any portion of the bed of this supposed lake." (p. 159.)

The decision, therefore, was that the land granted by the Government patent was bounded by the meander line and did not extend to the edge of the lake at all. It is too clear for comment that no riparian rights were or could have been involved in the case.

Still the Court said, *arguendo*, in its opinion:

"But in this state the title of abutting owners on waters which are meandered is held to extend only to high water mark, *the title of the bed being in the state*. Wood vs. Railroad Co., 60 Iowa 456; Serrin vs. Grefe, 67 Iowa 196; Noyes vs. Collins, 92 Iowa 566. As to whether, under a patent from the United States, the title extends to the center of a stream or lake, or is limited to the margin thereof, is held by the United States Supreme Court to be dependent on the law of the State." (p. 156.)

It will be observed that this language applies to all meandered waters, navigable or non-navigable. But it is an inaccurate statement of what the Court had in fact ever decided or intimated. The authorities cited by the Court in support of the proposition show this.

Wood vs. Ry. Co., 60 Iowa, 456, and Serrin vs. Grefe, 67 Iowa 196, were cases of navigable water; both involved land bordering upon the Des Moines river. There it was held that in cases of navigable water the title of the riparian owner extended only to high water mark.

Noyes vs. Collins, 92 Iowa 566, we have already had occasion to consider. In that case the Court simply approved of the ruling in the Wisconsin case cited, "that the title of the riparian owner upon a natural lake or pond does not extend *beyond the natural shore*." This was dictum; for, as we have seen from the case itself, the County held the title to the bed of the lake under the swamp land grant. The only question was whether the description in its deed carriedi ts grantee, Noyes, beyond the meander line mentioned therein, and it was held that it did not.

The same is true of the subsequent case of Noyes vs. Board of Supervisors, 104 Iowa, 175. That case simply followed the Noyes-Collins case upon substantially similar facts.

It is true that in a former case involving so much of the very lands here in controversy as the land between the meander line and the lake, wherein this plaintiff in error was plaintiff—but there was a different defendant—the Supreme Court of Iowa held that plaintiff's title and rights were not bounded by the meander line but extended to the high water mark of the lake. In that case, however, plaintiff's contention was that "he owned to the water's edge." (See p. 417.) Nothing more was involved. The Court said:

"In the determination of these cases, we have borne in mind the fact that in Schlosser's case the meandered line at no place touched the high water mark of the lake, and that in some other respects the facts are slightly different from those relating to the other two cases. These differences, however, are not material, and the same rules must govern in the determination of all three cases. Plaintiffs are riparian owners, and as such, they take title to all of the land lying between the meandered line and the high water mark of the lake."

Schlosser vs. Cruickshank, 96 Iowa, 425.

In Grant vs. Hemphill, 92 Iowa, 218, the Court said.:

"Where it appears that the government intended to sell all the land to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant, to the water's edge." (p. 224.)

"A riparian proprietor is one who owns land bounded upon a watercourse or lake. The evidence in this case shows that there was not at the time of the government survey, and is not now, *any body of water* east of the meandered line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner." (p. 224.)

And because there was no such water the plaintiff was held to be confined to the meander line as a boundary.

This being so, it follows conclusively that the remark above quoted relative to a riparian owner taking to the water's edge was *arguendo* and pure *dictum*. It was based upon nothing which was in the case being decided.

So in Ladd vs. Osborne, 79 Iowa, 93,

decided in 1890, plaintiff's land was a bounded by a meander body of water called "Goose Lake." The Court said:

"The meander line is not a line of boundary. It is made for the purpose of ascertaining the quantity of land in the tract bordering on the lake or stream. Kraut vs. Crawford, 18 Iowa, 549; Musser vs. Hershey, 42 Iowa 536. Under the rule of these cases, the plaintiff is a riparian owner, and his land *extends to the lake.*"

In this case ,however, nothing was involved but the land lying between the meander line and the lake. Plaintiff claimed that land and got it. He claimed nothing more. No question as to the bed of the lake was decided. The two cases cited; Kraut vs. Crawford and Musser vs. Hershey, involved land on the Mississippi river, navigable water, and the Court held that the riparian owners took to *high water*.

Such are the decisions of the Supreme Court of Iowa as to the title of a riparian owner bordering upon a river or lake extending "to the bank," "to high water," or to "the water's edge."

They resolve themselves into cases where nothing was in controversy beyond that.

It is clearly apparent that the Supreme Court of Iowa has never decided that the beds of non-navigable lakes vest in the State of Iowa. On the contrary, it has been careful not to so decide.

Thus, in a case already quoted from extensively, the Court said:

"What we have already said practically disposes of plaintiffs' claims by adverse possession of portions of the lake bed. *Whether the title to the bed remained in the United States or passed to the state*, no adverse possession thereof would be effectual, for the statute of limitations does not run as against the sovereign."

Carr vs. Moore, 119 Iowa 159.

And in a case decided in 1902, where the plaintiff claimed the bed of a lake under the swamp land grant, and the trial court "entered a decree to the effect that neither plaintiff nor the defendants had any title to the land, *the real ownership being in the* state." (p. 253) the Supreme Court said:

"The holding of the district court that the state is the real holder of the title to these lands we need not review. The plaintiff not being entitled to recover, it is immaterial, under the record as presented, whether the state has any just claim in the premises, or whether defendants have obtained title by reliction of the waters of the lake. We do not attempt to pass upon either proposition. The defendant claimed no relief by cross bill or petition. Hence, when plaintiffs' title was disposed of, that was an end of the case."

Ogden vs. Buckley, 116 Iowa, 357.

In that case there was a controversy as to the real character of the lake, which had originally covered the land involved in the suit, and after holding that plaintiffs had no title under the swamp grant because the land had never been selected or patented under that grant, the Court said further:

"An attempt at this time to prove conditions existing at so remote a period must necessarily involve much uncertainty. But few witnesses remain who can speak of their actual personal knowledge and observation, and those few labor under the inevitable infirmities of age and memory. The great changes which have taken place within the memory of the younger men in the wet lands and inland waters of the west forbid relying upon present conditions as proof of facts existing more than half a century in the past. *The record of the surveys then made and approved by the Land Department of the government carry with them a presumption of correctness,—a presumption which, in the opinion of the writer, should at this late date be well-nigh conclusive.*"

Ib. 357.

This decision was made April 12, 1902, less than two months prior to that of the case at bar which was decided June 3, 1902. (Record p. 125.) Its bearing on this case will be considered later.

Summarizing these cases we find (1) that none of them decide or purport to decide the effect of a government patent for land fronting upon a non-navigable meandered lake in Iowa so far as relates to title to the bed of the lake; (2) that none of them decide that a government patent under such circumstances does not convey title beyond the water's edge.

The lake bed cases are

(1) Noyes vs. Collins, 92 Iowa, 567, where the bed of the lake involved was on a certain section 15, and the Court said (p. 567): "Section 15 is a part of the swamp land grant from the United States to the State of Iowa, and from the State of Iowa to Harrison County." The controversy was between subsequent grantees of the County. It was held that plaintiff under the special facts, and special description in the deed from the County under which he claimed, took only to the shore of the lake. It was said (p. 569) that this "seems, *in view of the particular facts of the case*, equitable."

(2) Noyes vs. Board of Supervisors, 104 Iowa 175, was a case involving a title to the bed of the same lake, under deeds from the County. "All parties claimed through the swamp land grant of 1858." The facts were found by the Supreme Court to be substantially the same as in the Noyes-Collins case and on the authority of that case the decision was the same. Furthermore, in the last case contemporaneous construction of the deeds from the County was shown in that it had "from time to time for many years, surveyed portions of these lake beds, has platted the same in lots, and sold said lots to various parties." (p. 175.)

(3) Rood vs. Wallace, 109 Iowa, 5-14, was where Owl Lake had been partially drained, and the lands uncovered had on application of the state by its governor, been patented to the state as swamp lands. The state had patented these to the county, and the county had conveyed the same away. The controversy was between plaintiff, claiming remotely under the conveyances from the county, and the defendants who claimed the lands were subject to preemption and homestead, but they had made no entries. It was held that plaintiff's title was good against these "squatters." Riparian owners under the original government patents of meandered lots around the lake were not in the case. The Court said (p. 9 bottom), "no re-survey will be permitted which will in any manner prejudice their interests. They, as we have seen, are not made parties to this suit, and are making no objection to plaintiff's title."

The state intervened and set up title to the bed of the lake. It was held that it had no interest. The Court held that the finding of the Land Department, that the land was swamp land under the act of 1850, and *not the bed of the lake*, was conclusive on the state. Nothing more was or could be decided in this case. The holding that the uncovered lands were not a part of the bed of the lake ended the claim of the State. What was said *arguendo* as to "assuming" that the title to beds of lakes, "especially those of *navigable* lakes" was in the state was not decision.

(4) Carr vs. Moore, 119 Iowa, 152, was where plaintiff claimed portions of a lake bed by "accretion or reliction." The defendant claimed under the swamp land grant. The Court held as to plaintiff that no accretion or reliction was shown. They also claimed to the center of the lake, under the original government patents. The Court said, "there was at the time of the original survey no lake, in the proper sense of the term" (p. 157). And that "there was no body of water *proper* to be meandered" (following and citing the case at bar), and hence "that the original government patents to the lots now owned by plaintiffs did not confer any ownership beyond the meander line." (pp.158-9.) It added that "whether the title to the bed remained in the United States or passed to the state no adverse possession thereof would be effectual" (p. 159), showing that there was no attempt to decide in that case, whether the title to the bed of the lake was vested in the State of Iowa.

As to defendants claiming under the swamp land grant, it was held that no title was shown because there had been no selection or patents issued under such selection. Hence relief was denied to both parties.

(5) Nor did the Supreme Court of Iowa decide the question of title to the bed of the lake in the case at bar. Here plaintiff must recover upon the strength of his own title. What that Court did decide was that Mud Lake was not "proper" to be meandered; that for this reason the meandered line was a boundary line, and that Schlosser did not take beyond it. The Court said:

"But, where there is no adjacent body of water proper to be meandered, the rule we have mentioned will not apply. In such a case the meander line will be a boundary line, and one who purchases from the government according thereto can not claim title beyond it. We have, then to determine whether there was a body of water in section 30 proper to be meandered." * * * *

"We are equally clear that no permanent body of water of any considerable extent existed there." (p. 455.)

"If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and an existing permanent

lake proper to have been meandered, we might, perhaps, reach a conclusion on the facts in harmony with our former opinion; but the evidence before us precludes this." * * * *

"The fact that plaintiff claims beyond the shore line, when taken in connection with the testimony going to show *that the greater part of such body of water* was but temporary in character, is sufficient to convince us that no meander line should ever have been run here. ———————————————————————————————." * * * * * (p. 456.)

"We are further inclined to believe that when the meander line deviates so far from the true shore as it does in this case from the bank of the body of water attempted to be bounded according to all the evidence and the concessions of counsel, the error would be so gross as to warrant a re-survey." * * *

"It appears beyond question here that the meander line was not correctly run in the first instance, and we think it is satisfactorily disclosed that no body of water necessary to be meandered then existed where Mud Lake is shown on the plat to be." (p. 457.)

Schlosser vs. Hemphill, 118 Iowa, 452. (Record pp. 127-8.)

When the Court had decided therefore,, that the body *of water was "not proper to be meandered,"* and hence that the meander line was a boundary line beyond which plaintiff took nothing, it had decided the whole case. There was nothing further for decision except plaintiff's claim of title by adverse possession. As to that it was said:

"So long as title remained in the United States, the statute of limitations would not run (citing authorities). This land was not surveyed until the year 1898. Before t was laid out into legal sub-division, neither state nor county could make a selection or assert any title to it."

This was as to the land being swamp under the re-survey of 1898.

118 Iowa, 458. (Record p. 129.)

If, therefore, the Court did decide anything as to the bed of the lake, such decision was that the lands were swamp land and that the title remained in the United States until the re-survey and patents to the state thereunder.

In this condition of the case the Court decided nothing when it says *arguendo* (Record pp. 127 bottom, 128 top),

"If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and an existing permanent lake proper to have been meandered, we might perhaps reach a conclusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was is far south of the half sec-

tion line according to all the testimony. Beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake.

Rood vs. Wallace, 109 Iowa, 5.
Noyes vs. Board of Supervisors, 104 id. 174."

And, moreover, as we have seen the two cases cited do not decide the proposition "that beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake." The lake in Noyes vs. the Board of Supervisors, 104 Iowa, 174, was not a permanent lake. And the boundary line there was determined with reference to the peculiar facts in that case.

Rood vs. Wallace, 109 Iowa, 5, was the case where the Court itself took particular pains to point out that the rights of no riparian owners were in any manner involved.

The Supreme Court of Iowa, therefore, never has decided where the title to the beds of non-navigable lakes in Iowa is vested. So far as the effect of a government patent to a riparian patentee is concerned, that is open to question.

No more has it decided that a riparian owner of such lakes does not take title under a patent from the United States to the center of the lake, nor has it decided that under such patent the title of the riparian owner extends only to the shore of the lake.

(1) We need not further comment on Rood vs. Wallace, and Noyes vs. Board of Supervisors, just referred to, *supra*.

(2) We have seen that Noyes vs. Collins, 92 Iowa, 567, did not involve the effect of a government patent, and that the holding there that plaintiff took only to the shore of the lake was in the case of a private grant decided under special facts, and where both parties claimed under the same government patent which had been issued under the swamp land grant.

(3) Also, the case of Grant vs. Hemphill, 92 Iowa, 218, involving land in section 19 immediately north of section 30 in which the land in controversy in the case at bar is situated. Section 19 was a part of the same government survey, as section 30. The Court, in deciding that case, said:

"This township was surveyed by the United States in the year 1855, and the sub-divisions of the township were surveyed in 1857." * * * * * * * * * *

"The land in controversy is that marked on the government plat as under water, and the last line described is what is known as a 'meander line.'" (p. 220.)

"It appears from a very decided preponderence of the evidence that the land in controversy is not now, and probably never was, any part of a lake. It is true that some of the wit-

nesses testify that the inlet of Mud Lake extended up into the land. But there is no evidence that at or near the time of the survey, or since, there has been any body of water anywhere on the land, upon which to base a meandered line. Some of the land, like all bodies of land in that country, is low, flat, and marsh land, but the evidence shows that a greater part of the land claimed by Eaton is dry, tillable land, and that if it had been surveyed it would not have passed to the state under the swamp land grant." (pp. 221-2.)

"A riparian proprietor is one who owns land bounded upon a watercourse or lake. The evidence in this case shows that there was not at the time of the government survey, and is not now, any body of water east of the meandered line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner." * * * *

"There is not, and has not been, any body of water upon which to locate a meandered line." (p. 224.)

"The meander line and the banks of a stream or shore of a lake can not be held to apply where there is no body of water to which it can be referred." * * * *

"As we have said, there is no body of water anywhere within the boundary of the section to authorize any extension of the area of the lots which the government sold, and which plaintiff now owns." * * * *

"We hold that all of the land in dispute is part of the unsurveyed domain of the United States, to which no one can obtain title except through the regular government methods adopted by the general government for the disposition of the public lands." (p. 225.)

This case, therefore, does not determine any such principle of law as that the holder of a patent on a non-navigable lake takes to the shore of the lake. It was decided on the fact that "there is not and has not been any body of water upon which to locate a meander line."

It is cited in the case at bar in support of the "proper to be meandered" invention, but it has no bearing upon that novelty.

(4) Noyes vs. Board of Supervisors, 104 Iowa, 175, simply followed the prior Noyes-Collins case under the same facts. There the court said the parties claimed through the swamp land grant of 1850; and as already shown, *supra*, the case depended upon special facts and a special boundary line set out in plaintiff's deed of private grant. The facts, moreover, showed a contemporaneous construction in that plaintiffs' grantor, the County, had for many years surveyed and sold lands in the bed of the dried out lake to which plaintiff claimed title.

(5) Rood vs. Wallace, 109 Iowa, 8, was the Owl Lake case where no question of riparian ownership was involved. The Court said:

"Purchasers of lots abutting on the meandered line, or otherwise directly interested, are, it seems to us, the only persons who may object to the re-survey; and no resurvey will be permitted which will in any manner prejudice their interests. They, as we have seen, are not made parties to this suit, and are making no objection to plaintiff's title." (pp. 8-9.)

(6) Ladd vs. Osborne, 79 Iowa, 93, was where the plaintiff whose land adjoined a meandered body of water called "Goose Lake" claimed to the shore of the lake including land between the lake and his meander line. His claim was sustained. Nothing more was involved. It is not an adjudication that his line stopped at the shore of the lake, nor that it did not extend into the bed of the lake. Those questions were not involved.

(7) Carr vs. Moore, 119 Iowa, 159, was where the Court held that plaintiff did not take title beyond his meander line by accretion or reliction, and that "it is apparent that there was at the time of the original survey *no lake* in the proper sense of the term such as to give occasion for the application of the doctrine of accretion and reliction." And also held that the body of water was not "proper to be meandered."

There was dictum in that case as to taking title to the shore of the lake (p. 158 bottom.) But as to that the Court said:

"If there is no body of water corresponding to the meander line to which the ownership of the holders of the adjoining sub-divisions can extend, then the meander line limits the extent of the land conveyed. We conclude, therefore, that the original government patents to the lots now owned by plaintiffs did not confer any ownership beyond the meander line." (p. 158-9.)

There is nothing in this case upon which to base any claim that the Supreme Court of Iowa has, by *decision*, confined the holder of a patent for meandered lots along non-navigable lakes to the shore of the lake, or to the water's edge.

From this analysis of the cases it will be seen that no such proposition has ever been dicided by the Supreme Court of Iowa. The question, under its decisions, remains an open one, like the question of ownership of the beds of such bodies of water.

That this Court will not accept such dicta of the State Court, or what it may say *arguendo*, on the question of title to beds of non-navigable lakes, is conclusively decided in

Hardin vs. Jordan, 140 U. S. 385 and 387.

III

AS TO MUD LAKE.

The Supreme Court of Iowa does not decide or hold in its opinion in the case at bar that Mud Lake is not a permanent body of water. Stating what it proposed to decide, that learned tribunal said:

"We have then to determine whether there was a body of water in section 30 proper to be meandered" (Record p. 127); and deciding that proposition thus propounded the Court said:

"The fact that plaintiff claims beyond the shore line when taken in connection with the testimony going to show that the *greater part of such body of water was but temporary* in character, is sufficient to convince us that no meander line *should* ever have been run there." * * * * Yet it appears beyond question here that the meander line was not correctly run in the first instance, and *we think* it is *satisfactorily* disclosed that no body of water *necessary to be meandered* then existed where Mud Lake is shown on the plat to be." Record p. 128.)

It was on this ground that plaintiff's claim to the bed of the lake was decided in the Court below. The Court, however, concedes the existence of the lake. Thus, it says,

"It is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In the former case we found on the evidence then before us, that there was a tract of about one hundred acres between said line and the actual shore of the lake." (Record p. 126.)

And "from a careful reading of it (the evidence) * * * * the meandered lake which gives rise to this controversy is called 'Mud Lake,' and it must be manifest from what we have said lies north of plaintiff's land." (Record p. 127.)

And again: "The south shore of the body of water, such as it was, was far south of the half section line according to all the testimony. * * * * The fact that plaintiff claims beyond the shore line, when taken in connection with the testimony going to show that *the greater part of such body of water was but temporary* in character, is sufficient to convince us that no meander line *should* ever have been run here." * * * *

The record in this case shows a permanent lake substantially without conflict or controversy. Thus, the Secretary of the Interior, in ordering a re-survey, says:

"From the official plat of said township it appears that the lake extends into four townships, viz., 96 and 97, ranges 34 and 35, and is about five and one-half miles long, and from half a mile to a mile and a half in width." (Record p. 75.)

And in approving the re-survey he said:

"With his report Mr. Barber submitted a plat showing the land in question is mostly agricultural in character, with a marshy pond, called Mud Lake, covering portions of sections 25 and 30, with an outlet going west into Trumbull Lake. (Record p. 76.)

Turning to Mr. Barber's resurvey here referred to, made in 1898, we find him saying in his field notes:

"Proceed to the outlet of Mud Lake in section 25 and set instrument in graded road near bridge. Telescope is 9.95 ft. above water level of Mud Lake and 9.02 ft. above bottom of dry run or natural ditch 2 to 5 ft. wide on west side of road. Hence a rise of 7 inches *in the pond* would cause water to flow in said outlet, westward and a rise *of two feet would cover the broad grassy flat on each side of it west to Trumbull Lake.*" (Record p. 81.)

Not only does the Secretary of the Interior state that Mud Lake has "an outlet going west into Trumbull Lake," but the evidence in the case all shows this, so that when Mr. Barber states that "a rise of seven inches in the pond would cause the water to flow in said outlet westward," he means that the then existing pond or lake which he found there on section 30 would, under such circumstances, empty westward into Trumbull Lake.

As to this Trumbull Lake, the defendant himself testified:

"I am somewhat acquainted with Trumbull Lake, and with the outlet of Mud Lake into Trumbull Lake. Mud Lake is higher than Trumbull Lake. The outlet of Trumbull Lake is in the Sioux River. * * * * It is about a half mile from Mud Lake to Trumbull Lake." (Record p. 85.)

M. S. GREENE testified:

"Trumbull Lake is larger and covers a good deal more surface than Mud Lake and is a deeper Lake. * * * * Trumbull Lake is in Clay County about a mile and half from Mud Lake." (Record p. 16.)

Such a body of water is permanent so far as natural conditions are concerned. It may be removed, like most non-navigable lakes, by artificial means, and by the industry and engineering skill of man. We suppose, however, that a permanent lake is one which will remain indefinitely in the absence of agencies of this character. It would seem to be enough that this lake has apparently existed through the ages since the glacial period, and that it still exists. Of course it has been modified by the action of man in cultivating the surrounding lands. The evidence shows this clearly. But it still remains. The plat accompanying the field notes of the resurvey (See Exhibit 2, Record p. 73) shows the actual margin of the lake at the present time. It remains on the west line of section 30 a half mile wide as it was at the time of its

survey and meander in 1855. The margin depicted by Barber in 1898 corresponds exactly with the meander posts and lines set and run in 1855. From that point the lake, as depicted by Barber, extends northeast nearly to the northeast corner of section 30. At the geographical center of the section it is practically 80 rods in width. It runs nearly along the half section line from about the west line of the section, eastward to very near the geographical center of the section.

Another surveyor, J. T. Painter, made for defendant in 1897, a survey of section 30 and made a plat of the lake. (See Record 44, Exhibit 21.) On that plat he lays down "edge of high water," and shows Mud Lake to be practically the same as indicated by Barber's plat of the survey. He was asked, "What is there with reference to the bank of Mud Lake on this plat?" and answered, "There is a blue line represents the edge of high water." (Record p. 42.) He certainly had no doubt of the existence of Mud Lake for he speaks of it repeatedly.

All of the witnesses in their testimony as quoted *supra*, agree that all lakes in that portion of Iowa have been gradually receding for twenty years as land has been reduced to cultivation, and has absorbed the water which formerly ran off the tough prairie sod into the lakes, sloughs and watercourses.

M. S. Greene testified (Record p. 15) that the lakes in that locality have receded three feet.

M. L. Parr testified *for defendant*, and he is not contradicted, "All the lakes up north there, Lost Island Lake, and all the other lakes, were higher twenty years ago than in later years. Lost Island was three or – feet higher. And Mud Lake correspondingly high. (Record p. 46.)

And the surveyor, Painter, who was in Iowa in 1857, and testified for defendants, shows that 1857 was a wet year, there having been extremely heavy shows that winter; but he says: "I do not know how it was in 1857 when the survey was made (in July); except the Island and the point *it might all have been covered by one continuous body so far as I know.*" (Record pp. 53-4.)

Besides, the evidence shows, also without dispute, that there were springs in the bed of the lake, and an inlet coming in over section 19 north of it which drained a large area of country. This inlet was undoubtedly a slough with a grassy bottom, as decided in Grant vs. Hemphill, rather than a lake or a well-defined creek.

The field notes of Barber's resurvey are very significant. "A rise of seven inches in the pond (Mud Lake on section 30) would cause water to flow in said outlet westward, and *a rise of two feet would cover the broad, grassy flat on each side of it west to Trumbull Lake.*" (Record p. 81.)

The undenied fact, testified to by defendant's witness, Parr, is, that in the last twenty years Mud Lake with the other lakes in that part of Iowa, has receded three to . . . . feet, (Record p. 46) which means three feet and more. This shows with three feet added to the lake level at the time of the resurvey in 1898, that in 1857 when the government sub-division was made, all of section 30 meandered out, must have been a continuous sheet of water; and that extending west to Trumbull Lake, a distance of 1½ miles, was a broad sheet of water, covering the broad flat spoken of by Barber's field notes, with a still larger portion of Mud Lake on section 25, west of section 30. Moreover, 1857 was a wet year. Water poured into the lake from a great area to the north. The field notes and plat of the government survey then made show that on the south Lost Island Lake opened into Mud Lake. (Exhibits E and F, Record, 11). Under such undisputed facts, to hold as a proposition of law that Mud Lake "was not *proper* to be meandered," is to make a collateral attack on the government survey and patents thereunder nearly fifty years later, which surely can not be permitted in favor of a venture to divide such lands as can be thereby secured between a swamp land claimant and its attorney in the speculation.

Why should the government surveyor in 1857 have carefully meandered the east margin of Mud Lake over on section 29 if there was no lake there on section 30, and w th much less work he could have run the east line of section 30 straight through from the southeast to the northeast corner?

In its opinion the Court below cites "Ogden vs. Buckley, *d cided at present term*," (Record p. 129 top) and the case at bar is a good case for apply ng the rule there laid down. The Court said:

"An attempt at this time to prove conditions existing at so remote a period must necessarily involve much uncertainty. But few witnesses remain who can speak of their actua! personal knowledge and observation, and those few labor under the inevitable infirmities of age and memory. The great changes which have taken place within the memory of younger men in the wet lands and inland waters of the West forbid our relying upon present conditions as proof of facts existing more than half a century in the past. The record of the surveys then made and approved by the land department of the government carry with them a presumption of correctness,—a presumption which, in the opinion of the writer, should at this late date be well-nigh conclusive."

Ogden vs. Buckley, 116 Iowa, 357.

This is squarely in conflict with the case at bar, which strikingly illustrates how weak and illusory are government surveys, patents and titles based thereon, if courts a half cen-

tury later may search their own inner consciousness for legal reasons to declare a lake not "proper" to be meandered. Especially is this so where *its own former decision regarding the same land* is thus overturned, and its own decisions are thus made more conflicting than the verdicts of successive juries. This Court has often expressed itself in no uncertain terms as to thus collaterally assailing and overturning government titles, and the intolerable mischiefs of such conflicting decisions. We quote a single case which is peculiarly applicable:

"It is this unassailable character (of the patent) which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."

Smelting Co. vs. Kemp, 104 U. S. 641.

Nor does the Court below strengthen its position when it declares, "It appears beyond question here that the meander line was not correctly run in the first instance." (Record p. 128.)

We are to take the case upon the presumption, sustained by the undisputed facts, that the lake at the time of the survey was a sheet of water extending over the whole of section 30, except the meandered lots, and extended east upon section 29 as shown by the meander lines on that section.

Much must necessarily be left to the discretion of the surveyor in running meander lines. He is on the ground confronted by actually existing physical conditions. This discretion under all the cases is not to be reviewed by the courts a half century later upon new conditions then existing. In a case of gross fraud, where no actual survey was made at all, as in the Minnesota case, Security &c. Co. vs. Burns, 192 U.S., 167. Or, in a case where permanent conditions show gross fraud, as in the Oregon case, where no body of water existed north of the land meandered, French-Glenn Co. vs. Springer, 185 U. S., 47, or, probably in a case where the mistake is so gross that it can

only be accounted for by presuming corrupt or fraudulent motives, the courts may review the reported surveys as in the case of any other absolutely void action on the part of a public officer. But where the case is purely one of discretion in meandering an actually existing body of water, the discretion exercised can not be impeached because the surveyor could not look ahead fifty years and tell what the conditions might be regarding such water when the whole face of the country had been changed by the industry of man; nor can such discretion be reviewed because the surveyor did not correctly judge as to the depth of the water by which he was confronted, extending, as it did then, in a continuous sheet over miles of country, and connected, as it then was, with Lost Island Lake on the south by an opening of twenty rods or more, and with Trumbull Lake on the west by a broad and continuous sheet of water.

Taking conditions as they then existed, the only deviation ~~marked~~ marked from the shore of the lake of the meander line—a line of nearly one mile in length—was in cutting off a point of land near the west line of this section which extended into the lake like a thumb, by running across the base of the thumb instead of following its sinuosities out around the north end of this protuberance. The evidence shows that this point of land contained twenty-three acres. The land at that time was worth little or nothing. Is the discretion of the surveyor in running his meander line to be impeached by the courts, and the government survey and patent to be upset because of this action? To state the proposition, is to stamp its absurdity.

Passing that point the surveyor had to descend into wet land at the dividing line between lots 2 and 3. In doing this he did not follow the sinuosities of the shore, but, as the evidence shows, ran along a ridge of dry land, running mathematical lines from point to point, and leaving some dry land there between the meander line and the lake. It is clearly absurd to say that this warrants any impeachment by the courts of the discretion vested in him. In running the line from the wet point between the two lots, his line again extended northerly around a point of drier land. Probably he did not follow the exact shore in running this portion of the meander. The subsequent surveys in evidence show that he included some wet land and excluded some dry land. (See Exhibit G for plaintiff Record p. 12). Yet nothing of this kind can justify a court after the lapse of many years in attempting to impeach the discretion and action of the surveyor by declaring "it appears beyond question here that the meander line was not correctly run in the first instance." This is not merely a finding of fact. It is an assertion as well of the legal power in the courts to impeach collaterally and overthrow the legal discretion vested in the surveyor in performing his duties in

the field. It appears from the case of Schlosser vs. Cruickshank, 96 Iowa, 414, as to conditions then existing as declared by the Supreme Court of Iowa.

"The meander line run by the government surveyors touches the shore line of the lake in one or two places only, and then so runs as to leave in Schlosser's case about one hundred acres of land between said line and the actual shore line of the lake." Yet this did not shock the Court as it then existed, for it held that Schlosser was entitled to this land. And it said:

"The rule of the cases cited from this state is that, as a meander line is not a boundary line, the owner of land adjoining such meander line takes title to the high-water mark of the stream or body of water, if navigable, lying adjacent thereto. In other words, in such cases the adjacent proprietor is a riparian owner, whose title extends to and embraces all land lying between such a meandered line and the high-water mark of a *navigable* stream or other body of water; and such, we may say, is the general holding. In some states it is held that the rights of such riparian owner extend further, and embrace all land lying between the meander line and the center of the stream or body of water, as the case may be."

Schlosser vs. Cruickshank, 96 Iowa, 418.

And it added:

"For the purpose of determining the matter now in controversy it is not material that we discuss the questions as to the ownership of the land under the lake, or refer more fully to the cases relating thereto."

Ib. 419.

In other words, the title to the bed of the lake was not drawn in question in that case. Schlosser claimed only to the shore of the lake.

It is obvious that a meander line so run that the Supreme Court of Iowa, as constituted in 1895, sustained the line with a full showing before it as to the facts and the land meandered out between the line and the shore of the lake, is not a case which involves gross or corrupt abuse of discretion on the part of the surveyor; nor a case of such gross or palpable error as to warrant the same court as constituted in 1902—seven years later—in overhauling and overturning the discretion and action of the surveyor, and in rendering a conflicting decision which holds the meander line for naught.

There must be—in other words—something more gross in the action of the surveyor than that which the court sustains at one time, and overturns upon criticism and judicial condemnation a few years later The change of four out of six members of the court in the meanwhile can not warrant the last result in order to overturn a government survey and

patent. The facts should be such, not only that the same court at all times, bu. that all other courts at all times should be able to say without hesitation that a government patent and survey ought to be open to collateral impeachment in this summary manner. Nothing short of this we submit can justify bringing government titles into disrepute and doubt by such belated collateral attacks, and that, too, in the interest of speculative ventures based upon digging up latent defects in titles as against the actual and meritorious settler who has acquired the land as a homestead, and his successors in interest.

It is obvious that the title must be settled upon the facts as they existed at the date of the survey, and as they addressed themselves to the discretion of the government surveyor at that date. The government patent issues with reference to those facts and not with reference to changed conditions many years later. For, not only have lakes changed in Iowa, but rivers have changed in Iowa. The Des Moines river, to illustrate, was originally navigable. A vast land grant was made by Congress to improve its navigation. At one time—it is a matter of well-known Iowa history—steamboats ascended the river as far as Ft. Dodge. So the Cedar river was originally navigable as far as Waterloo, and a very considerable traffic was carried on by steamboats, as far north as that point. The waters in these rivers have receded The Cedar river has become non-navigable in fact; the Des Moines river has been declared non-navigable by act of Congress. Nevertheless, riparian owners on the banks of these rivers do not extend their title to the middle of the river because of such change. They still take to ordinary high-water mark only. This has been expressly decided by the Supreme Court of Iowa.

Wood vs. Ry. Co., Iowa, 456.
Serrin vs. Grefe, 67 Iowa, 196.

So, the fact that the waters in Mud Lake have receded can not affect the original meander lines of that lake, and can not change the title of a riparian owner to the middle of the lake, if he took such title under his patent and the government plat and survey with reference to which his patent was issued.

Under the facts shown the survey of 1857 and meander lines are conclusive.

U. S. vs. Valljo, 1 Wall., 660.
Live Stock Co. vs. Springer, 185 U. S., 51, 52 and 54.
Smelting Co. vs. Kemp, 104 U. S., 641.
Russell vs. Maxwell, &c. Co., 158 U. S., 253.

And, as declared by the Court below in the opinion in this case,

"When a body of water is meandered, such lines are not run as boundaries, but merely for the purpose of defining the sinuosities of the shore and as a means of ascertaining the quantity of land to be paid for by the purchaser.

Schlosser vs. Cruickshank, *supra*,
and authorities therein cited.

In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, adjoining owner will usually take title to the actual shore line, at ~~east~~ last." (Record p. 126.

And see—

Schlosser vs. Cruickshank, 96 Iowa, 549.
Kraut vs. Crawford, 18 Iowa, 549.
Musser vs. Hershey, 42 Iowa, 356
Steele vs. Sanchez, 72 Iowa, 68.
Ladd vs. Osborne, 79 Iowa, 95.
Grant vs. Hemphill, 92 Iowa, 218.
Case at Bar, Record 126.
Hardin vs. Jordan, 140 U. S., 380.
Horne vs. Smith, 159 U. S., 43.
Railroad Co. vs. Schurmeir, 7 Wall. ~~43~~ 272.

IV.

THERE IS NO ISSUE AS TO WHETHER THE LAKE WAS "PROPER" OR "NECESSARY" TO BE MEANDERED, NOR WHETHER THE MEANDERED LINE WAS CORRECTLY RUN.

The issues tendered by the answers were:

"As to whether said lots were meandered, defendant has not sufficient knowledge to form a belief, and denies the same. The defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30." (Record pp. 2 and 6.)

This in no manner raises the question as to whether the meander line was correctly run, if run at all. And in no manner raises the question as to whether the lake was "proper" or "necessary" to be meandered if the meander lines were run "with reference to a lake then existing in part upon section 30."

Both of these were special matters and special issues not inhering in the general denial. If relied upon they should have been pleaded in avoidance of plaintiff's claim that "said lots were meandered by the government surveyor, and said meandered lines run with reference to a lake then existing in part upon said section, and the plat as made by the said surveyor, and filed for record as aforesaid, shows the meander line to coincide with the shore line of said lake, and shows

no reservation between said meander line and the lake." There was no such pleading in avoidance in the answers. The defendants did not rely upon any such matter.

How, then, could the court below make these issues in avoidance, which it raised itself for the first time on appeal, not only the controlling and decisive issues in the case, but grounds for collateral attacks upon the survey and patent? If the court below was at liberty to do this, it would naturally decide its own issues in its own favor. In this manner a new method would appear to have been invented for the most summary and collateral of all imaginable attacks upon government patents and titles, with no opportunity to plead to the same, or introduce evidence as to the same, or for even so much as a hearing on argument touching the same. It may, of course, be conceded, however, that argument would have done no good. The opinion shows that these matters were decided when the non-existent and supposititious issues were formulated and stated by the court below.

It results what whatever the court below may have stated regarding the law or the facts relating to these supposed issues is extra judicial, and an attempt to pass upon matters not submitted to its jurisdiction or decision by the pleadings in the case. See authorities cited in Division IV of Brief of Points, *supra*.

The other issues set up by the answers relate to the rights of defendant Hemphill as a purchaser under the swamp land grant and re-survey, and the right of defendant Ryan to enter lots 12 and 13 of the re-survey as a homestead.

These are decided in favor of defendants upon the assumed issues raised by the court.

V.

Title as to Bed of Lake.

Schlosser's distinct claim in his petition to the land as far north as the south half of section 30 extends, distinctly raises the effect of the patent under which he claims as a conveyance of all that portion of the lake.

This question, as we have seen, the court below did not decide in terms. It denied his title as thus claimed under the laws of the United States, and under authority exercised under the United States in the issuance of the patent under which he claims, and in making the survey, field notes, and plat upon which his patent is founded. Because of the denial of his rights thus specially set up as to the effect of his patent under the laws and official action of United States officers, we submit that the jurisdiction of this court clearly and undeniably exists in this case. This jurisdiction can not be defeated because of the extra-judicial action of the Supreme Court of Iowa in denying plaintiff's claims because of supposed but

really non-existent issues under the pleadings.

As the jurisdiction of this court attaches, we assume that it will decide the claim of plaintiff as made, which presents a federal question, and that it will decide the question as made and as presented for determination by the pleadings of the respective parties. The authorities as to jurisdiction are cited *infra*.

That question is: Does Schlosser, under the government patent of lots 2 and 3, take title to the center of the lake, or to such portion of the bed of the lake less than that as he distinctly claims? The question as to the bed of the lake is a common law question, and under repeated decisions of this court—which we do not think it necessary to cite here—it is to be decided with reference to the law of the State as declared by its own judicial tribunal of last resort if it has been so declared.

We have, however, carefully reviewed the decisions of the Supreme Court of Iowa and have shown, we submit, that that Court has never decided this question.

It must result, as the question involved plaintiff's claim under the laws, authority, survey, field notes and plat of the United States, that this Court, in the absence of such decision, must determine the question for itself. It seems self-evident that plaintiff is not to be denied the title which he thus claims upon suppositious issues in the State Court, and then be denied his title here because the question under consideration never has been decided by the State Court.

In this tribunal the question is free from difficulty. At common law the riparian owner upon a non-navigable lake takes to the center of the lake. And this is true as between the United States and its riparian patentee upon such a body of water, unless the state courts have established a different rule.

Hardin vs. Jordan, 140 U. S., 371.
Kean vs. Calumet Canal Co., 190 U. S., 452.
Hardin vs. Shedd, 190 U. S., 508.

In the last named case this Court said:

"The claim of the plantiffs in error to the land below the original water line depends on its having passed by the patent of the United States. The patent to Holbrook, from which they derive an important part of their title, was dated May 20, 1841, long before the Swamp land Act. *At that time the land under the lake, as well as that surrounding it, belonged to the United States*, and if grants of the United States should be construed without regard to state laws, it may be assumed that, subject to all questions of the proper adjustment of lines, Hardin would have prevailed. When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds

for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. Nevertheless it has become established almost without argument that in the former case as in the latter the effect of the grant on the title adjoining submerged land will be determined by the law of the State *where* the land lies. In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned. Hardin vs. Jordan, 140 U. S., 371; Shively vs. Bowlby, 152 U. S., 1, 45; Grand Rapids & Indiana R. R. Co. vs. Butler, 159 U. S., 87, 90, 93; St. Anthony Falls Water Power Co. vs. St. Paul Water Commissioners, 168 U. S., 349, 363. (Such cases are not affected by Rev. Stat. Pars. 2476, 5251.) When land under *navigable* water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore. The rule as to conveyances bounded *on non-navigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise*, apart from the Swamp Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point."

Hardin vs. Shedd, 190 U. S., 518-19.

The land under a non-navigable lake bed belongs, as here decided, to the United States and not to the state, and, as here decided, "in case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the State so far as its conveyances are concerned."

What is the position of the plaintiff in error as to the bed of the lake? Clearly he will take to the center of the lake as between himself and the United States unless "the general law of the State" prevents this result. But "the general law of the State" in this situation has never been determined by the State Court. It is a purely common law question There is no statutory enactment in the State of Iowa, and none is claimed on behalf of the defendants in error, which in any way bears upon or settles "the general law of the State." What the common law of the State is this Court must determine.

It is the same common law which was declared in Hardin vs. Jordan, *supra*. It is true that this Court, as "a con-

venient, possibly the most convenient way, of determining the effect of the grant," would give effect to a different common law rule if such different rule had been established by the Supreme Court of Iowa. No such conflicting rule of law has been established by the courts of Iowa, and hence the rule laid down by this Court in Hardin vs. Jordan must prevail. In other words, this Court must decide for itself what the common law rule in Iowa is the same as in all other questions where the common law of the State is for determination and the State Courts have not determined it. In most cases, indeed, this Court would determine the common law itself without reference to State decisions. But where title to real estate is involved a uniformity of decisions is desirable and such title ought not to depend upon conflicting decisions between the State and Federal Courts.

We shall assume, then, that the patent under which Schlosser claims carried title to the middle of the lake by virtue of the common law rule established by decisions of this Court. Schlosser, by his petition, claims title to the whole south half of section 30. Does this carry him beyond the center of the lake? In other words, is the north half of section 30 north of such center?

Turning to the plats in evidence it will be seen at a glance that it is not. On the contrary, he might have successfully claimed more, but that will not vitiate his claim to the extent made.

Turning to the plat of the Government survey made in 1857 the case is free from difficulty. (See Exhibits E and F, Record p. 11.) That shows the whole of section 30, except the meandered lot one in the northwest corner and Schlosser's meandered lots two and three, to have been lake at the time the survey was made. The north line of the south half would practically divide the lake on the west line of that section in the middle; extending the north line of the south half of the section eastward from that point, it would take less than half the lake shown by the plat.

Turning to the plat of Barber's resurvey in 1898 the result is the same (See Exhibit 2, Record p. 73); there the line between the north and south half of section 30 is laid down, and it appears to run directly through the center of the lake on the west line of the section. A few rods east of the west line the south "actual margin" of the lake runs along close to the middle line of the section until near the geographical center when it bears off to the northeast which would carry Schlosser's title to the middle of the lake away north of the south half of the section.

The plat of defendant's witness and surveyor, Painter, leads to the same result as the plat of the re-survey. (See Record Exhibit 44.) The small island in the middle of the section shown by the plat of the re-survey (Record 73) as "high

timber," and shown by plaintiff's Exhibit G as "island," would not change the result. This was an inconsiderable body of land containing nineteen acres as shown by the testimony and by plaintiff's plat, Exhibit G (Record p. 12), and is spoken of by nearly all witnesses as an "island." The testimony shows that it was such until the water in the lake receded. It was not worth a separate survey when the government survey was made. It passed under the government patent giving title to the center of the lake.

St. Louis vs. Rutz, 138 U. S., 245 to 251.
Sanford vs. Mangin, 30 Ga., 355.
Kimball vs. Schoff, 40 N. H., 190.
Hardin v Jordan 140 U.S. 384

Or it was like any other dry land lying along the shore, for instance, between the meander line and the center of the body of water meandered. It was too inconsiderable in size, surrounded as it was by water, and of too little value to warrant survey, and was evidently designed to pass by the patent like other dry land north of the meandered line.

VI.

THE RE-SURVEY.

Under the patent to Anthony the plaintiff in error certainly took beyond the meander line to the edge of the water in the lake. Such was the holding of the Supreme Court of Iowa in

Schlosser vs. Cruickshank, 96 Iowa, 414.

Schlosser claimed nothing more in that case; that covered the land then in controversy. The Court there said:

"A meander line is run when a watercourse or other body of water is the external boundary of the adjacent land; and a line showing the place of the water course or other body of water, and its sinuosities, courses and distances, is called a 'meander line.' The general rule adopted by both federal and state courts is that meander lines are not run as boundaries of the fractional tract thus surveyed, but for the purpose of defining the sinuosities of the banks of the streams or other body of water, and as a means of ascertaining the quantity of land in such fraction subject to sale, and which is to be paid for by the purchaser. (Citing authorities.)

"The rule of the cases cited from this state is that, as a meander line is not a boundary line, the owner of land adjoining such meander line takes title to the high-water mark of the stream or body of water, if navigable, lying adjacent thereto. In other words, in such cases the adjacent proprietor is a riparian owner, whose title extends to and embraces

all land lying between such a meandered line and the high-water mark of a *navigable* stream or other body of water; and such, we may say, is the general holding. * * * * For the purpose of determining the matter now in controversy, it is not material that we discuss the questions as to the ownership of the land under the lake, or refer more fully to the cases relating thereto."

Ib. pp. 417, 418, 419.

The decision in the case at bar does not deny the ruling thus laid down. It seeks to take the case out of that rule by holding that the lake was not "proper or necessary to be meandered," and that the "meander line was not correctly run." We have already sufficiently considered those matters.

But as to whether the meander line was correctly run, that was decided in the Schlosser-Cruickshank case, and this is what the Supreme Court of Iowa then said:

"The undisputed evidence is that the shore line of the lake, in fact, never coincided with the meander line as run by the government surveyors; that the banks of the lake are clearly defined, and in many places many feet higher than the water; that nearly all the land in dispute has never been overflowed; and that there is every evidence that the shore line of the lake is now practically the same as it was in 1857, when all of this land was first surveyed. * * *

"Defendants contend that whatever may be the presumption against a meander line being a boundary line, when it is shown that, at the time the survey was made, a strip of land was left between said meandered line and the shore line of the lake, then the meandered line becomes the boundary line of the adjacent owners. The question we must determine is whether the plaintiffs, as owners of the land adjoining the meandered line, take title to, and are the owners of, all the land lying between said line and the shore line of the lake."

Ib. 416–417.

"Appellants urge, however, that, in cases like those at bar, the presumption that the government intended to convey beyond the meandered line, and to the lake, is not conclusive; that it may be overcome by evidence showing a contrary intent. This may be conceded, and still we do not think defendants have shown facts which should be held to overcome such presumption. It can not be said that evidence which merely shows that the meandered line was not, when the government survey was made, coincident with the line of the lake, and that there was then a body of land lying between such line and the high-water mark of the lake, will overcome the presumption. To overcome such presumption would require some evidence to show that the grantor, the general government, had done, or attempted to do, some act inconsistent with the presumption; such as having *previously*" (that is, before the patent,) "surveyed the land in dispute as government land,

or conveyed it to others than plaintiffs' remote grantors, or was in some manner making a claim to the disputed ground. Not an act is shown on the part of the general government inconsistent with the claim and presumption that this land in controversy was intended to and did pass by its patents to the remote grantors of plaintiffs." Ib. 421.

So that court, on full consideration on the first controversy over this land, correctly decided the question as to the effect of the meander line, which it has now, as we submit, erroneously decided in the case at bar. The verdicts of successive juries as to the title to lands under the same patent could not have been more conflicting.

It follows that the dry land north of the meander line which Ryan in the case at bar has entered as a homestead belongs to plaintiff in error under the Anthony patent. This land contains one hundred and one acres. (Record p. 5, Exhibit E.) That is practically the number of acres to which the Supreme Court of Iowa quieted Schlosser's title in the above case of Schlosser vs. Cruickshank. The Court said:

"The meander line run by the government surveyors touches the shore line of the lake in one or two places only, and then so runs as to leave, in Schlosser's case, about one hundred acres of land between the said line and *the actual shore line of the lake.*"

Ib., 416.

The Court in that case further said:

"In the determination of these cases, we have borne in mind the fact that in *Schlosser's case* the meandered line at no place touched the high water mark of the lake, and that in some other respects the facts are slightly different from those relating to the other two cases. These differences, however, are not material, and the same rules must govern in the determination of all three cases. Plaintiffs are riparian owners, and, as such, they take title to all of the land lying between the meandered line and the high-water mark of the lake."

Ib., 425.

In the case at bar the Court below entirely overlooked the fact that the defendant Ryan claims this one hundred and one acres as a homestead, and does not in any manner comment upon or decide that question. In the statement of the case prepared by the Court itself it is said:

"The half section in question, that is such part of it as lies beyond the original meander line, was re-surveyed by the Government in the year 1898 and platted into five lots, of which lots 11, 14 and 16 are claimed by defendant Hemphill, and lots 12 and 13 by defendant Ryan. These claims are founded upon conveyances from Palo Alto County, under a patent issued to the State, *under the swamp land grant of* 1850, and which is based upon the re-survey of 1898." (Record p. 126.)

And, as the opinion shows, *deciding the case under the swamp land grant only*, the Court holds against Schlosser's title. Obviously his title is perfect to the land claimed by defendant Ryan as a homestead. No re-survey can by any possibility have any effect as to the land between the meander line and the lake once awarded to Schlosser by the Supreme Court of Iowa, and now taken away from him in favor of a homestead claim which had its inception about thirty years after the inception of Anthony's title under which Schlosser claims. It is certain that no re-survey can affect title or right which has arisen under a former patent. In this case the original plats and survey are conclusive as to the meander line, and, there being clearly a lake to meander, Anthony, at the least, took to the bank of the lake and all accretions.

Live Stock Company vs. Springer, 185 U. S., 54.

And subsequent attempted dispositions of the lands are inoperative and void.

Davis vs. Wiebbold, 139 U. S., 507.
Hardin vs. Jordan, 140 U. S., 401.
Moore vs. Robins, 96 U. S., 534.

That the re-survey was wholly ineffective and without jurisdiction as declared by the Land Department itself, see,

Cragin vs. Powell, 128 U. S., 698.
Mitchell vs. Smale, 140 U. S., 406.
Kean vs. Calumet Canal Co., 190 U. S., 461.
Grand Rapids, &c. Co. vs. Butler, 159 U. S., 95.
Ry. Co. vs. Schurmeir, 7 Wall., 289.

This rule was accepted by the court below in the decision of the case at bar. (Record p. 126 bottom, 127 top.)

The case of Mitchell vs. Smale, 140 U. S., cited *supra*, is peculiarly in point as to the protuberance of land extending into the lake near the northwest corner of plaintiff's meandered lots. The fact that the meander line cut off this projection at its base seemed to be very persuasive in convincing the court below that the meander line was not correctly run. In the Mitchell vs. Smale case a tongue of land projected into the lake beyond the meander line. The trial court, under a new survey, deprived the holder under the original patent of this tongue of land with other land outside of the meander line. This Court reversed the court below and said:

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, *or represented so to be*. It is nothing more nor less than taking from the first grantee a most valuable,

and often *the* most valuable, part of his grant. *Plenty of speculators will always be found, as such property increases in value,* to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, *is a cause of vexatious litigation which ought not to be created or sanctioned.* The pretense for making such surveys, arising from the facts that strips and tongues of land are found to project into the water beyond the meander line run *for the* purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow." (pp. 412-13.)

"The existence of such projecting tongue is entirely consistent with the water or lake being the natural boundary of the plaintiff's land, which would include the said projection, if necessary, in order to reach the said boundary. It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary." (p. 414.)

This well depicts the situation of plaintiff in error in the case at bar. His remote grantor, Anthony, entered the fractional lots 2 and 3 of section 30, as a homestead as early as 1869, for his patent was dated 1874 (Record p. 120), and there must have been five years' occupation of the land as a homestead at that time before the patent could issue. When he entered these fractional lots they were in fact a mere tongue of land running out between Mud Lake on the north and Lost Island Lake on the south. (See Government plats, Exhibits E and F, Record p. 11.) The lots were better located for an "Experimental Government Mosquito Farm" than for any

other purpose. They were of so little value that no land speculator had been found to pay the government price for them, or even to enter them with a land warrant. Their prospective value as a homestead was in the lake-front, and the accretions upon that front. The evidence shows that Anthony exercised dominion as far as he could over all the lands in controversy, selling timber off the island then surrounded by the lake. (Record p. 17, bottom; 19, 24, top, 29, 31.) Plaintiff bought the land in 1890, relying upon the riparian rights and occupying the whole half section so far as it admitted of occupancy up to the time of the re-survey. (See his testimony, Record pp. 32 to 34.) Then a speculative venture was organized by which one-half of the land was to be given for services in procuring the new government title against Schlosser, and the other half was to go to the County so far as swamp lands were concerned.

That a meritorious farmer and settler, succeeding a homestead settler, should be plundered of his landed estate in the manner sought in this suit seems incredible, and we are far from believing that this Court will sanction such enterprises. In the interest of peace and certainty in the land titles of Iowa such suits ought not to succeed.

The cases of French-Glenn &c. Co. vs. Springer, 185 U. S., 47, and Security Land &c. Co. vs. Burns, 193 U. S., 167, are distinguished by the facts from the case at bar.

In the French-Glenn Co. case there was *no lake* opposite the land with reference to which riparian rights were claimed.

In the Security Land Company case there was no survey, in fact, made. The trial court found that the pretended survey was fictitions and fraudulent. This Court said:

"The non-existence of a lake anywhere near the spot indicated on the plat is a strong reason for regarding the so-called meander line as one of boundary instead of a true meander line, and when the plat itself is the result of a gross fraud, and indeed is entirely founded upon it, the reason for refusing to recognize the lake as a boundary becomes apparent."

193 U. S., 182.

Still, even in that case this Court said:

"That this was a fraudulent survey can not be denied. *Still, the government is concluded by such survey, so far as the lands actually described, granted, and paid for are concerned,* but it will not be concluded in regard to other lands, which were not within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots, when such lake or body of water is in fact and always has been more than half a mile away from such lots, and where the patentee has received all the land that he actually paid for."

Ib. p. 187.

So, in Niles vs. Cedar Point Club, 175 U. S., 300, the field notes showed that the land meandered out was "flag-marsh; impassable marsh and water." It was held that this was not a meander of a body of water, and that the meander line was a boundary line. This Court said:

"Of course, if the fractional sections patented to Margaret Bailey did not border on some body of water there were no riparian rights, and if the conclusion of the trial court that this marsh was land (for swamp and boggy land is to be treated as land) was correct, then whatever changes may have come to the marsh—whether it became more or less subject to overflow—would not alter the fact that the rights of Margaret Bailey, the patentee, were limited to the very lands which were conveyed to her, and for which she paid, and did not extend over the meander line in to the territory north."

Ib. 308.

And so in Hahn vs. Smith, 159 U. S., 41, the meander line was along a bayou designated as the Indian river; the patentee took the land between the meandered land and edge of the bayou, but he claimed land across the bayou, and between that and the true Indian river, in other sections. The land thus claimed amounted to six hundred acres. This Court held that he was concluded by the survey designating the bayou as Indian River,and could not extend his riparian rights to the river itself.

None of these decisions warrant the action of the Court below in the case at bar.

VII.

THE SWAMP LAND GRANT.

1. Hemphill claims three lots under the swamp land grant of 1850. While the suryeyor in 1857 treated these lots as part of Mud Lake, a claim might have been made for them under the swamp grant if they had been selected in apt time.

Prima facie they were lake, and passed under the Anthony patent which gave title to the center of the lake; or as accretions to the meandered lots if it should be held that the patent gave title only to the edge of the lake.

If a patent expressly describing these lots, or the south half of section 30, had been issued by the government to Anthony, it can not be doubted that this would have been an adjudication on its part that such lands were not swamp and did not pass under the swamp land grant of 1850.

Rogers &c. Co., vs. Am. Emigrant Co., 164 U. S., 559.
McCormick vs. Hayes, 159 U. S., 347.
Chandler vs. Calumet Co., 149 U. S., 89.

Young vs. Charnquist, 114 Ia., 116.

But whatever Anthony's patent took by its legal effect was as much within it and covered by it as though specially described therein. The plats and field notes were in effect a part of the patent. They showed that the lands in front of the meandered line were lake, and not swamp. Thus, on the west line of section 30, they showed meander posts on "south side of *lake*;" and on north bank of "lake." (Record p. 57.) On the east line of the section the notes of meander line on section 29 show 40 rods north from the south line of that section, "intersect *lake* and marsh bearing north and south. *Set a quarter section post in mound pit east 8 links and east of true quarter corner, 10 chains and thirty links.*" (Record p. 56.) At the east point of plaintiff's lot 2, on the section line between sections 30 and 31, the field notes read: "Lake marsh. Set a meander post in mound of turf." (Record p. 121.) And the field notes and plats show an outlet between Lost Island Lake and Mud Lake at the southeast corner of section 30. The plats and field notes, therefore, not only showed that plaintiff's lots bordered on a lake, but showed that this lake was one of a series of lakes—Lost Island Lake, Mud Lake, Trumbull Lake, all connected together. As to this the Secretary of the Interior thus describes the situation:

"From the official plat of said township it appears that the lake extends into four townships, viz.: townships 96 and 97, range 34 and 35, is about five and a half miles long, and from a half mile to a mile and a half in width." (Record p. 75.)

This accurately describes the situation shown by the original survey and plats, if we start at Lost Island Lake in township 96, range 34, go north into Mud Lake in tonship 97, range 34, and thence west into Trumbull Lake in township 97, range 35. This was originally "the lake" referred to by the Secretary, but as the country settled up portions of "the lake" on the government plats were given the respective names (Lost Island, Mud and Trumbull) above mentioned. When the original plats and survey were approved they showed plaintiff's lots to be part of a tongue of land projecting into "the lake." (See Exhibits E and F, Record p. 11.) When the Land Department issued Anthony a patent for these lots it undeniablv conveyed lots which that Depatrment declared—(it being "according to the official plat of the survey of said land")—to be on and upon "the lake," with a front of more than a mile thereon according to the calls for distances shown by the meander line. This was an assertion by the Department that this frontage was lake and not swamp land, and was necessarily an adjudication against the present swamp land claim. The legal effect of the patent under the common law rule, as declared by this court, was to carry title to the center of that portion of "the lake"

upon which the lots fronted. This rule prevails in the absence of a different rule by the state courts. Hence the patent under which the plaintiff claims, *prima facie*, at least carries title to the south half of section 30, as claimed by him. Can this title be upset by the swamp land grant forty years after the original survey, and thirty years after Anthony entered the land as a homestead?

Proceeding upon the theory that lots 11, 14, and 15, of the Barber survey might have been claimed in apt time under the swamp grant, which claim would then have been for decision by the land department, we think this question must still be answered in the negative.

It has already been pointed out that section 30 was fully surveyed in 1857 and the corners of the section established and marked. The half section corners were also established and marked on the south and east sides of the section. Any surveyor could have taken the plat and field notes of that survey and sub-divided the section into quarter sections, forties and fractional forties.

In the Government surveys this work is never done in the field. Explaining the method of the Government sub-division of sections the Commissioner of the General Land Office in his report for the year 1870, at page 30, said:

"The sections are subdivided into quarters, containing 160 acres; and, finally, the quarters are still further subdivided into quarter-quarters, embracing forty acres. The sectional divisions into quarter sections and quarter-quarter sections are not actually run and marked in the field; the subdivision of the section of 640 acres into quarter sections is designated by appropriate marks on the half-mile posts established in the field on section lines; while the quarter-quarter sections, or 40-acre tracts, are not so designated in the field, but are indicated by the surveyor general on township plats of the survey by there marking in red ink the surveyed section lines, in order to obtain the quantity of legal subdivisions exhibited on the plats of survey, which are protracted on the scale of two inches to the mile. The public lands are sold by the foregoing subdivisions, and the boundaries of the smallest subdivisions, to-wit: into quarter and into quarter-quarter sections, or 160 and 40 acre tracts, not actually surveyed in the field, can be run and marked on the face of the earth for the purchasers or owners thereof by any surveyor, in accordance with the principles laid down by the act of Congress approved February 11, 1805."

The State and the County might therefore at any time after 1857 have selected as swamp land the land in controversy in lots 11, 14 and 15 of the re-survey of 1898. It was not a case of unsurveyed land. And by the original survey the Government was bound.

U. S. vs. Vallejo, 1 Wall., 660.
Live Stock Co. vs. Springer, 185 U. S., 51, 52, and 54.
Russell vs. Maxwell, 158 U. S., 253.
Smelting Co. vs. Kemp, 104 U. S., 651.

We emphatically deny the power or jurisdiction of the Land Department to make a re-survey of the section under these circumstances, as against rights acquired under the original survey.

Cragin vs. Powell, 128 U. S., 691.

And, as we understand, the Department itself so decided as to this very survey.

2. At any rate, the State and County made their selections of swamp lands and included no part of section 30 therein.

This was done under the instructions issued by the Commissioner of the General Land Office on November 21, 1850, allowing the states to make their own selections, if they so desired, rather than to accept the official surveys, plats and field notes. The method pursued by the State of Iowa under its own statutes is thus stated by this court in

Buena Vista County vs. Ry. Co., 112 U. S., 169.

"The State of Iowa adopted the alternative of making its own designations of lands, claimed by it as corresponding to the description of the grant, and passed, at different times, laws directing by whom they should be made. A statute of 1853 required a full and complete return of the examination and survey of the swamp and overflowed lands, when completed by the county surveyor or other person appointed for that purpose, to be forwarded to the Secretary of State, whose duty it was to report the same to the Surveyor-General.

A subsequent statute, passed January 25, 1855, authorized the Governor to adopt such measures as to him might seem expedient to provide for the selection of the swamp lands of the State, and to secure the title thereto. The Governor accordingly issued circulars, one in 1855 and one in 1858, to the county judge of the several counties, requesting the selection to be made in his county by the county surveyor or other agent, the lists thereof to be forwarded to the Surveyor-General or to the Secretary of the State of Iowa, to be by him forwarded to the proper department for recognition and approval. The act of January 13, 1853, was carried into the Revised Statutes of the State of 1860, as follows:

'Section 927. In all those counties where the county surveyor has made no examinations and reports of the swamp lands within his county, in compliance with the instructions from the governor, the county court shall, at the regular term thereof, after the taking effect of this act, appoint some com-

petent person, who shall, as soon as may be thereafter, after having been duly sworn for that purpose, proceeded to examine said lands and make due reports and plats, upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made marked on said plats, to the county courts respectively, which courts shall transmit to the proper officers lists of all said swamp lands in each of the counties, in order to procure recognition of the same on the part of the United States, which lists, after an acknowledgment of the same by the general government, shall be recorded in a well-bound book provided for that purpose, and filed among the records of the county court.'"

By act of the General Assembly of Iowa approved January 25, 1855, it was provided:

"That for the purpose of preserving a proper record of all lands belonging to the state, and of their final disposition, and of transacting business in relation thereto, there shall be a state land office established at the seat of government, with a register thereof, who shall be elected by the peolpe on the first Monday in April next, and shall hold his office for two years, and until his successor is elected and qualified."

See Revision of 1860, page 18.

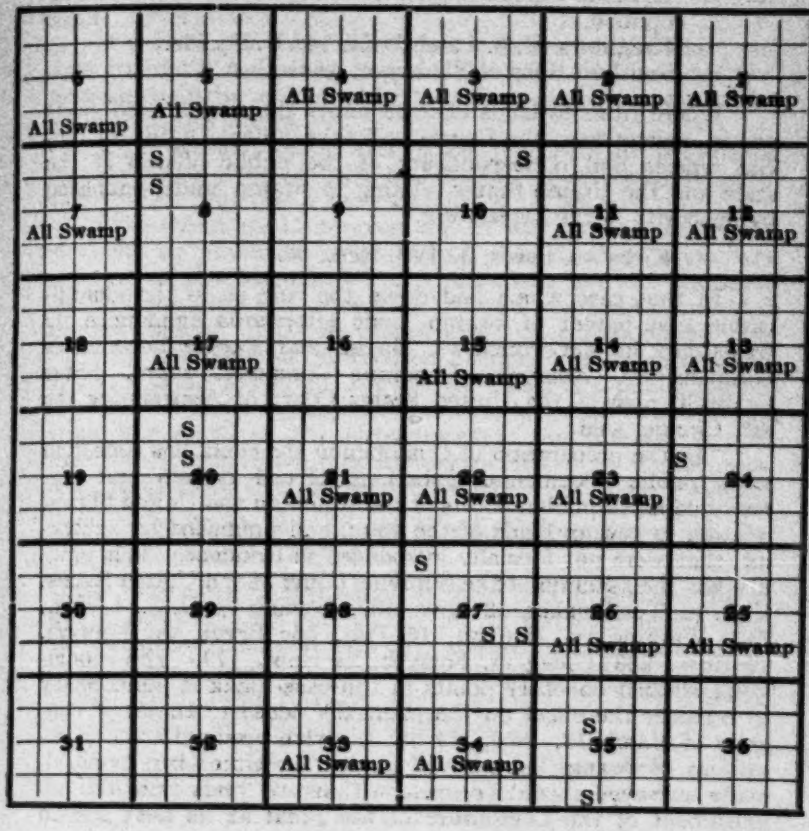
The Code of Iowa of 1873 provided:

"Section 83. The register of the state land office shall keep his office at the seat of government. The books and records of such office shall be so kept as to show and preserve an accurate chain of title from the general government to the purchaser of each smallest sub-division of land; to preserve a permanent record in books suitably indexed of all correspondence with any of the departments of the general government in relation to state lands; to preserve by proper records copies of the original lists furnished by the selecting agents of the state, and of all other papers in relation to such lands which are of permanent interest."

The report of the register of the State Land Office for Iowa for the year 1875 shows the lands selected on behalf of Palo Alto County as swamp lands under the swamp land grant. On page 212 of that report there appears the list of lands selected as swamp in the very township in which the land in controversy is situated. 20 full sections in that township were selected and claimed as swamp. In addition to that 11 40-acre tracts were selected. This was considerably more than one-half of the whole township, and would seem to have been a very liberal and amply sufficient selection of swamp lands. No lands in sections 19, 29 or 30 were selected or claimed. One mile away, on the north, the whole of section 17 was selected. A mile on the southeast the whole of section 33 is in the list. Adjoining that, the whole of section 34 was claimed.

Two miles away, on the east, a portion of section 27. Adjoining that, in solid mass, the whole of sections 21, 22, 23, 25 and 26. In section 20, which corners on section 30, a selection of 80 acres claimed as swamp was made.

The entire swamp selections in the township as thus reported are shown on the plat below



These selections forbid any possibility of an idea that Palo Alto County was not hunting vigorously for lands to which any claim under the swamp land grant might justly be made. They exclude all lands on section 30 and show conclusively that the County did not at that day regard any portion of section 30 as swamp land. The records of the United States Land Office at Washington show the same selections, and the courts will take judicial notice of these public reports and archives.

Heath vs. Wallace, 138 U. S., 583-4.
Jones vs. U. S., 137 U. S., 216.
Caha vs. U. S., 152 U. S., 222-3, and cases there cited.
Romero vs. U. S., 1 Wall., 742.
U. S. vs. Teschmaker, 22 How., 405.
Fremont vs. U. S., 17 How., 557.
U. S. vs. Freight Assn., 166 U. S., 364. (Dissenting opinion.)
Knight vs. U. S. Land Ass'n, 142 U. S., 169.
Smith vs. City of Shakopee, 44 C. C. A. 1.

Where titles to lands claimed under the swamp land grant are in controversy, the Courts will take judicial notice of official reports and correspondence of the public officers of the state and the United States relating to swamp lands, published by authority of the Legislature.

Kirby vs. Lewis, 39 Fed. Rep., 66.

In that case which laid down the rule as to the identification and patent of swamp lands afterwards announced by this Court in McCormick vs. Hayes, and Rogers Locomotive Company vs. American Emigrant Company, *supra*, Judge Caldwell, now of the United States Court of Appeals for the 8th Circuit, said:

"In the preparation of this opinion the court has consulted some public documents, embracing official reports and correspondence of public officers of the state and the United States, relating to swamp lands of the state, and published by authority, that were not formally introduced in evidence. This practice has the sanction of the Supreme Court of the United States. U. S. vs. Teschmaker, 22 How., 405; Romero vs. U. S., 1 Wall., 742; Watkins vs. Holman, 16 Pet., 56; Bryan vs. Forsyth, 19 How., 338; Gregg vs. Forsyth, 24 How., 179. The conclusions reached on other points in the case make it unnecessary to consider the effect on the plaintiff's deed of the act of congress of March 12, 1860, (12 St. 3) which required that all selections of swamp lands to be made thereafter from lands already surveyed should be made within two years from the adjournment of the Legislature of the State at its next session after the date of the act."

In

Knight vs. Land Assn., 142 U. S., 168-9.

it is said in the statement of the case:

"To understand precisely the exact nature of the question involved in this case a somewhat more detailed statement of facts than is contained in the above findings of the referee will be found useful. These facts are not contradictory of those findings, and are recited in former decisions of this court,

statutes of the United States, and of the State of California, and the records of the Interior Department, of all of which the court can take judicial notice."

And this court, both in the opinion of the court by Mr. Justice Lamar, and the concurring opinion by Mr. Justice Field, seems to have taken judicial notice of the records, decisions and opinions of the Land Office and Department of the Interior.

In a California case, the Supreme Court of that State noticed judicially the proceedings of the Land and Interior Departments relative to the real estate there in controversy. The bill in that case averred:

"Said sections have ever since remained so withdrawn by virtue and force of such withdrawal"; but the court, after showing that this was a mere conclusion of law said:

"The withdrawal, however, was in fact revoked on August 15, 1887, by executive order after a rule to show cause was served upon the Atlantic & Pacific Company and the Southern Pacific Company, and after each of said companies had filed answers thereto. For the proceedings and action of the Secretary of the Interior in relation thereto, see Atlantic & P. R. Co., 6 Land Dec. Dep. Int., 77-93. This is a public record, of which the court takes judicial notice, and such action, being within the power of the Department of the Interior, is conclusive, and might be properly considered even if the complaint had alleged that the withdrawal had not been revoked."

So. Pacific Ry. Co. vs. Wood, 57 Pac. Rep., 392.
Same Case, 124 Calif., 484.

3. The attempted selection of these lots in section 30 as swamp lands in 1898 was clearly an afterthought based upon the speculative venture with Mr. Evans, already referred to. He had been Register of the United States Land Office at Des Moines, Iowa, from May 29, 1894, to June 30, 1897. And of this the courts will take judicial notice.

York & C. R. I. Co. vs. Winans, 17 How., 686.
Riland vs. Brown, 75 Iowa, 679.
Keyser vs. Hitz, 133 U. S., 138.

The state courts will take judicial notice of United States officers within their respective States, including Receivers of United States Land Offices.

Bullock vs. Wilson, (Ala.) 5 Port., 338.
Herriot vs. Broussard, (La.) 4 Mart. (N. S.), 260.
Barton vs. Hempkin, 19 La., 510.
Lerch vs. Snyder, 112 Pa. St., 161.

It may fairly be presumed that he there acquired knowledge both of the facts and of the law and practice of the Land

Department, which set this speculative venture on foot. The case as to this feature seems to be peculiarly within the mischiefs pointed out by this Court in

Mitchell vs. Smale, 140 U. S., 412.

"Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned."

As to Mr. Evans' part in the transaction it would seem to be within the condemnation visited by this court upon somewhat similar transactions in

Cragin vs. Powell, 128 U. S., 700.
Taylor vs. Brown, 5 Cranch, 256.

His grantee, Hemphill, claiming under a quit claim deed from him, apparently with full knowledge of the facts, for he introduced the contract of Mr. Evans in evidence, and also claiming under a mere executory contract with the county of Palo Alto, is in no better situation than Mr. Evans himself would be if a party to this litigation. As shown by the cases last above cited, such a belated and speculative claim to real estate is not looked upon with favor by a court of equity.

4. The situation of Palo Alto County, the immediate beneficiary of the swamp land grant, under direct legislative grant from the State of Iowa, is not different from that of the County in the cases of

McCormick vs. Hayes, 159 U. S., 347-8.
Rogers Locomotive Co. vs. Am. Emigrant Co., 164 U. S., 559.

The delay and *laches* of the County in asserting any claim to the lands under the swamp land grant, its action in selecting other lands in the same township as swamp lands and in excluding the lands claimed by the plaintiff from such selections, the great lapse of time during which the title of Anthony, the original patentee, and the plaintiff here, his successor in interest, remained unquestioned; the new rights which have grown up under the Anthony patent and possession thereunder, are amply sufficient to estop the County and its grantees, who are in no better situation than it, from asserting the speculative claim of title which the record in the case disclosed.

In the case of Kirby vs. Lewis, *supra*, the laws of Arkansas relative to swamp selections were practically the same as those of the state of Iowa; and in a case where the facts were substantially similar to the case at bar Judge Caldwell said:

"The agent who made the selections resided in the county, and was charged with the duty of selecting all the swamp lands in it. His official duty, as well as the fees he received for his services, would impel him to include in his selections all lands coming within the purview of the grant, and it is highly probable that he did so. It is a maxim of the law that a public officer is presumed to have fulfilled every requisite which the discharge of his duty demands (Russell vs. Beebe, Hemp., 704), and this maxim is applicable to the state agent, *and it will be presumed that he selected and reported all the swamp lands in the county in accordance with his official duty; and after the lapse of 30 years, and on the facts of this case, this presumption would seem to be conclusive.* U. S. vs. Beebe, 127 U. S., 338, 8 Sup. Ct. Rep., 1083; 9 Ops. Atty. Gen. 204."

The same presumption must arise in the case at bar.

Furthermore, this delay is directly in the teeth of the Act of Congress of March 12, 1860, which reads as follows:

"An Act to extend the Provisions of 'An Act to enable the State of Arkansas and other States to reclaim the Swamp Lands within their Limits' to Minnesota and Oregon, and for other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act of Congress entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' approved September twenty-eight, eighteen hundred and fifty, be, and the same are hereby, extended to the States of Minnesota and Oregon; Provided, that the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

"Sec. 2. And be it further enacted, That the selection to be made from lands already surveyed in each of the States including Minnesota and Oregon, under the authority of the act aforesaid, and of the act to aid the State of Louisiana in draining the swamp lands therein, approved March second, one thousand eight hundred and forty-nine, shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the Governor of the State, that the surveys have been completed and confirmed.

"APPROVED, March 12, 1860."

12 U. S. Stats. at Large, 3.

This statute has never been amended or repealed. We

submit that it is an effective statute of limitations both at law and in equity completely barring the swamp land claim set up by Hemphill.

It is now fully settled that title under the swamp land grant does not pass until swamp land selections have been presented to the Land Department of the General Government, and that Department has acted favorably upon such selections, and thereon has issued patents.

This being so, we perceive no reason why it was not entirely competent for Congress in the interest of peace in land titles, and to avoid confusion therein and the consequent public mischiefs, to fix a time within which claims under the swamp land grant should be presented to the tribunal designated by that grant, for final determination. By the act in question Congress fixed that limit. This court seems to accept that view and the decisions of the Commissioner of the General Land Office and Secretary of the Interior enforcing it, in

Buena Vista Co. vs. R. R. Co., 112 U. S., 174.

And see Fussell v Gregg 113 U.S. 550 561-4-5

The next Legislature of Iowa after the passage of this Act adjourned April 9th, 1864. This gave until April 9, 1866, to make swamp selections in Iowa. We have seen that section 30 was surveyed in 1857. No reason is shown for postponing swamp selections in that section later than the date fixed by this Act. And there is no reason why the prescribed bar should not be enforced.

The plaintiff, by his reply, set up that the resurvey and proceedings thereunder were without authority or jurisdiction for the reason that prior thereto the United States had caused section 30 to be surveyed and platted, and thereafter sold and conveyed the land according to the official plat to John A. Anthony; and thus, by said patent, the United States parted with all its title to all the land in controversy herein. (Record 7, Division II of Reply, and Record p. 9.)

He also by reply pleaded in bar the adverse possession of plaintiff and those under whom he claimed for more than ten years prior to the commencement of the suit, and that defendants were barred by the statute of limitations. (Record p. 10.)

The court below held that the statute of limitations did not apply because the title to the land remained in the United States until 1898. If, however, the title passed under the Anthony patent, as we have attempted to demonstrate, then the decision of the court below was wrong *because of the legal effect of that patent*, and very evidently that decision is a federal question which may be reviewed here. The court below did not pass upon the federal statute of limitations of March 12, 1860, above set forth, and that statute is within the pleadings and for the determination of this court in so far as it affects

the claim of defendant Hemphill under the swamp land grant.

We have seen that under the circumstances of the case the lines run by the Government Surveyor in 1857 are conclusive. On the question of the effect of such lines in a swamp land case it was said in a concurring opinion by Mr. Justice Field:

"The approved survey upon which the patent was issued crossed the mouth of Mission Creek and included the lands above its mouth, among them the premises in controversy. The question involved, therefore, was whether in an action of ejectment for the possession of those lands the plaintiffs could collaterally assail the correctness of the official survey upon which the patent was issued and establish another line as the true boundary, and then recover the lands on showing that they were outside of the new boundary thus established. I do not think that such a position was ever successfully asserted in any court. If there was error in the survey embodied in the patent it could not have been shown in this action. It could only have been corrected by direct proceedings for that purpose instituted by the government or by its authority. This is elementary law, and in vain will authorities be sought to contradict this view."

Knight vs. Land Assn., 142 U. S., 205-6.

"The ascertainment of the true line of the boundaries of the claim confirmed was a matter especially entrusted to that department by the laws of Congress, as already stated. If the officers of that department in executing the survey made mistakes, ran erroneous lines and included lands which they should have excluded, those facts did not justify the assertion that they acted without jurisdiction in making the survey, and that, therefore, their whole proceedings were void. If all that is asserted be true, they only erred in the exercise of their jurisdiction, and the remedy for their errors before the issue of the patent lay in an appeal to higher officers of the department—from the surveyor general to the commissioner, and from his decision to the Secretary of the Interior; and if after the issue of the patent like objections were urged, the remedy could be sought only by direct proceedings."

Ib., 211-212.

Obviously the court below could not deprive plaintiff of his land under the Anthony patent, the government survey, plats and field notes, upon collateral attacks and suppositious issues raised by itself in the first instance.

Furthermore, the plats and field notes when duly approved had the force of a deposition as to the facts relating to the survey thus written out and depicted.

"Plats and certificates because of the official character

of the surveyor general have accorded to them the force and character of a deposition; the same as in Arguilar's certificate to a copy of the grant, as we held in the case of Wiggins, 14 Peters, 346."

U. S. vs. Hanson, 16 Peters, 201 bottom, 202 top.

"The official return of the surveyor general has accorded to it the force of a deposition. So we held in the case of Breward and Hanson ,to which we refer."

U. S. vs. Lowe, 16 Peters, 166.

To the same effect,

U. S. vs. Boirdore, 11 How., 553 bottom.
U. S. vs. Breward, 16 Peters, 143.

Thus, in the case at bar, it conclusively appears from the survey, field notes and plats, that at the time of the survey Mud Lake and Lost Island Lake opened into each other at the southeast corner of section 30, and that section 30 itself was then lake to the extent depicted by plats and field notes, opening in turn into Trumbull lake at a considerable distance westward.

Thus a very considerable lake region undeniably existed at the time the survey was made in 1855 and 1857. A large area was covered by a continuous and apparently permanent sheet of water upon which the land in controversy fronted. The survey can not be summarily set aside as "not proper" or for errors, upon conjectures raised by a court forty years later.

That court itself has decided that the sole test as to alleged swamp land is "What was its character on the 28th of Sept., 1850"; and that the character of the land at that time of trial was not admissible in evidence.

Connors vs. Meservey, 76 Iowa, 695.

5. In any case, courts of equity act in analogy to statutes of limitations. This is familiar and elementary doctrine. Trusts are not always included in the rule, but there is no question of trust in the case at bar.

The *laches* of the State and Palo Alto county in asserting any title or claim under the swamp land grant was continuous for thirty years, or three times the Iowa statutory period, after the inception of the title under Anthony's homestead entry; it was fifteen times the period of the bar prescribed by the act of Congress after Anthony's homestead entry, and sixteen times the period of that bar after the swamp land claim was required to be asserted in 1866. Such *laches* in view of the adverse possession under the Anthony title ought to conclude defendant Hemphill as to his claim under the swamp land

grant, and under the peculiar circumstances of this case and the speculative character of his claim, it seems to be a peculiarly appropriate case for application of the equitable rule.

The doctrine was long ago laid down by this court and has been continuously maintained up to the present time, that

"A court of equity, *which is never active in relief against conscience, or public convenience,* has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity, *but conscience, good faith,* and reasonable diligence. When these are wanting, the court is passive, but does nothing; *laches* and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court."

Piatt vs. Vattier, 9 Pet., 416-417.

And it was held in that case that adverse possession was a sufficient defense as against the long continued *laches* of the plaintiff.

In the case at bar we do not think the court can either find "conscience, good faith or reasonable diligence." And in Iowa laches in claiming the legal title under a public grant has been held a bar to the assertion of such legal title when obtained, in a case where indemnity land was earned under a railroad grant. The railroad was completed in 1869. Nine years later the land was selected as indemnity for land which had been sold within the six-mile limit of the grant. A patent was issued under the railroad grant in 1893. The County of Webster claimed under the swamp land grant and sold the land in 1860. But it was never patented to the State or the County under the swamp grant. The land had been taken possession of under the supposed title from Webster County and improved in 1887. It was held that there had been such laches in securing title under the railroad grant and in asserting the title, that the plaintiff could not maintain the suit against one in possession under the swamp land grant.

Young vs. Snell, 115 Ia., 32.

The same rule was applied under the same circumstances and with reference to the same railroad grant in,

Young vs. Hansen, 95 Iowa, 721.
Bourne vs. Ragan, 96 Iowa, 572.

In the last case it was said:

"The laches of the railroad company are such that every equitable consideration demands that it and its employés should be estopped from now questioning the plaintiff's title. It is

quite apparent that the innocent purchasers of these lands should be protected in their homes from such attacks as are made upon them in this case, and in the case of Young vs. Hansen, above cited." And the same rule has been declared by the court below as to laches in asserting title under the swamp grant.

"This plaintiff and his grantor have for about thirty years in good faith, under a patent title from the government, been the ostensible owners of this land to which he now seeks to have the title quieted. The only claim against such a right is a doubtful fact as to the actual character of the land as to being swampy. We are led to believe that, up to a recent date, no one has openly treated the land as of that character, but, on the contrary, with knowledge that it was claimed, under an entry from the government, as not such land, the grantors of the defendant have acquiesced in the ownership of the plaintiff for such a length of time that neither they nor their grantee should be permitted to dispute it."

Knapp vs. Paine, 95 Iowa, 67-8.

See also

Miller vs. McIntyre, 6 Pet., 62.

Where it was sought after thirty years to establish a trust to land entered with a land warrant which in fact belonged to plaintiff's ancestor, this court after referring to the great increase in the value of the property said:

"The interests of public order and tranquility demand that parties shall acquaint themselves with their rights within a reasonable time, and although this time may be extended by their actual ignorance or want of means, it is by no means illimitable."

And the suit was held to be barred by laches.

Wetzel vs. Minn. Ry. Co., 169 U. S., 241.

And again,

"No rule of law is better settled than that a court of equity will not aid a party whose application *is destitute of conscience, good faith, and reasonable diligence*, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiesence in the assertion of adverse rights has occurred."

Hammond vs. Hopkins, 142 U. S., 250.

Applying these cases, we insist that upon no possible ground should the claim of Hemphill under the swamp grant be sustained in the case at bar.

And these matters are for consideration and determination by this court.

Applying precisely similar matters to a claim under the swamp land grant as against a patent from the United States, this Court said:

"As the court below did not proceed upon the grounds we have stated to be proper, and as its judgment deprived the defendant of rights secured by the laws and exercised under the authority of the United States, that judgment must be reversed, and the cause remanded for further proceedings consistent with this opinion."

McCormick vs. Hayes, 159 U. S., 348.

And to the same effect is

Rogers Locomotive Co. vs. Am. Emigrant Co., 164 U. S., 559.

So here, as the court below failed to give proper effect to the patent under which plaintiff claims, and its action should be reversed.

VIII.

JURISDICTION.

1. The Anthony patent under which plaintiff in error claims having been based upon and with reference to a sufficient survey of section 30, actually made and approved by the Interior department, and the lots thereby conveyed fronting upon an actual lake then existing and now existing, the title claimed by plaintiff was thereby fixed and determined so far as the land department was concerned. That department was absolutely without power or jurisdiction to act further in the matter by new survey.

Davis vs. Wiebbold, 139 U. S., 507.
Hardin vs. Jordan, 140 U. S., 401.
Moore vs. Robins, 96 U. S., 534.
Cragin vs. Powell, 128 U. S., 698.
Mitchell vs. Smale, 140 U. S., 406.
Kean vs. Calumet Canal Co., 193 U. S., 453.
Grand Rapids &c. vs. Butler, 155 U. S., 95.
Ry. Co. vs. Schurmeir, 7 Wall., 289.
Cited in "VI, Points of Law and Facts," page 24, *supra*.

And distinctly holding this rule are the cases of

Noble vs. Union River Logging Ry., 147 U. S., 175-6.
U. S. vs. Schurz, 102 U. S., 402.
Moore vs. Robins, 96 U. S., 530.

2. It results that patents or incipient titles under the

swamp and homestead acts, based upon such void action of the land department, are themselves equally void. In sustaining such subsequent patents and incipient titles the court below denied the legal effect of the Anthony patent as claimed by plaintiff, and denies his express claim of title thereunder. Whether such decision was rightful or erroneous it is reviewable by this court.

3. We have already seen that the court below did not found its decision upon any finding of fact which ousts the jurisdiction of this court. Its holding that Mud Lake was not "proper" or "necessary" to be meandered, is not a finding of fact but a conclusion of law. It is nothing less than the assertion of the legal power to review the discretion vested in the government surveyor and land department, and thereupon to hold that such discretion was not properly or correctly exercised. It was not a case where there was no lake, or no survey in fact, or a grossly fraudulent survey. It is obvious and undisputed from the plats and field notes that the government surveyor made an actual survey and an honest meander of the lake as it then existed. The court below does not deny this or hint at any fraud. It simply concludes, in legal effect, that in view of what is known to or conjectured by it forty years later, if it had been the surveyor it would not have meandered the lake. This is a denial of the legal effect of the patent under which plaintiff claims, upon a legal conclusion by the court below,—a legal conclusion which we submit was erroneous, and which the court was without jurisdiction to assert as against an ancient survey and patent—for muniments of title which are thirty years old are deemed ancient at the common law.

1 Greenleaf on Ev., 15th Ed., Section 21.

The legal conclusion of the court below that the meander line was not correctly run is open to the same objections and is reviewable in this tribunal. It has been pointed out, with full citation of authorities, *supra*, that this line under the circumstances of the case is absolutely conclusive, and that no court has jurisdiction to set it aside or disregard it.

4. To sustain the swamp land patents under the unauthorized and void survey, and under the undisputed facts of the case, already pointed out and discussed, was an erroneous denial of plaintiff's title under the Anthony patent, and of the legal effect of that patent, which is reviewable here.

By legal implication, in denying plaintiff's title to the land between the meander line and the lake, the court below sustained the claim of defendant Ryan under his homestead entry, based upon the same void and unauthorized survey, although that learned tribunal appears to have been totally unconscious of the fact that a homestead entry was before it

for determination as against the legal effect of plaintiff's title under the Anthony patent. That action of the court below is clearly reviewable here.

The prior decisions of this court sustain this view as to all of the foregoing matters.

So far as asserting the swamp land grant against the patent under which plaintiff claims is concerned, the jurisdiction of this court is undeniably sustained by two of its decisions already cited which are directly in point.

McCormick vs. Hayes, 149 U. S., 347.
Rogers Locomotive Works vs. Emigrant Co., 164 U. S., 573.

5. In some of the cases decided by this court which are in point in the case at bar, the question of jurisdiction has not been discussed by the court or passed upon in express terms.

But, as was said in recent cases,

"The rule is well established that, 'on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes.' M. C. & L. M. Railway Co. vs. Swan, 111 U. S., 379, 382; King Bridge Co. vs. Otoe County, 120 U. S., 225; Martin vs. Balt. & Ohio R. R. Co., 151 U. S., 673, 690; Powers vs. Chesapeake & Ohio Railway, 169 U. S., 92, 98; Great Southern Fire Proof Hotel Co. vs. Jones, 177 U. S., 449, 453."

Continental Natl. Bank vs. Buford, 191 U. S., 120.

"The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not. Mansfield, Coldwater &c. Railway vs. Swan, 111 U. S., 379, 382; Metcalf vs. Watertown, 128 U. S., 586; Morris vs. Gilmar, 129 U. S., 315; Continental National Bank vs. Buford, ante, 119."

Warner vs. Searle & Hereth Co., 191 U. S., 194.

In a case where the legal effect of the patent of plaintiff in error touching riparian ownership as claimed by him was denied by the state court, and denied by this court, jurisdiction to pass upon the questions involved was none the less sustained. It was said:

"Motion was made to dismiss this writ of error for the want of a Federal question, but in view of the fact that defendant's title depends upon a Spanish grant claimed to have been perfected under the treaty of 1819 between the United States and the King of Spain, 8 Stat., 252, and a patent of the United States dated December 28, 1836, in alleged confirmation of

such claim, we do not see how such motion can be sustained, unless upon the theory that the Federal questions so raised are frivolous and undeserving of further notice. We are of the opinion that they can not be so considered, and the motion to dismiss must therefore be denied."

Mobile Trans. Co. vs. Mobile, 187 U. S., 482.

And sustaining the jurisdiction of the court against a motion to dismiss where it appeared, not from the pleadings but from the opinion of the court below, that plaintiff claimed rights in real estate under an act of Congress, and his claim was denied, is the case of

Land & Water Co. vs. San Jose Ranch Co., 189 U. S., 179.

In a late case the plaintiff in error claimed as a riparian owner under patents from the United States, and under the legal effect of such patents. His claims were rejected by the Supreme Court of Illinois. On error to that court it was urged by the defendant in error against the jurisdiction of this court (190 U. S., 517):

"The decision of the Illinois Supreme Court complained of involved a question of local law purely, upon which its judgment was final. The pivotal question in this case is that the local law of the State in which lands patented by the United States lie, governs the construction to be given to grants of lands bordering upon waters, whether navigable lake, navigable stream, or non-navigable lake or stream." (Citing authorities.) (Page 519.)

This was in accordance with the dissenting opinion of Mr. Justice White in the case of

Kean vs. Calumet Co., 190 U. S., 474-5.

This court, however, maintained its jurisdiction, saying upon this point:

"The decree having been affirmed by the Supreme Court of the State, 177 Illinois, 123 S. C., 161 Illinois, 462, the case is brought here by writ of error. Mitchell vs. Smale, 140 U. S., 406, 410; Shively vs. Bowlby, 152 U. S., 1, 9, 10."

Hardin vs. Shedd, 190 U. S., 518.

These cases of Mitchell vs. Smale and Shively vs. Bowlby are decisions sustaining the jurisdiction of this court on like writs of error. Undeniably then the Court decided in express terms that it had jurisdiction in the Hardin-Shedd case.

So in the above cited case of Kean vs. Calumet Company, Mr. Justice White having raised the question of jurisdiction in his dissenting opinion, it is quite obvious not only that this

court under the general rule above quoted passed upon its jurisdiction, but that it must have expressly considered that question in deciding against the point made in the dissenting opinion.

Both of these decisions are in point in the case at bar.

In Mitchell vs. Smale, 140 U. S., 407-410, the same questions were involved and were decided with reference to the law of the State of Illinois as to riparian ownership upon a non-navigable lake. It was expressly decided by this court that Smale's claim as to the legal effect of his patent gave the United States Circuit Court jurisdiction, and the jurisdiction of this court was maintained on error. It was there said of the petition for removal, opinion by Mr. Justice Bradley:

"It states very clearly that the controversy between the parties involved the authority of the Land Department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute, after and in view of the patent under which the plaintiff claimed the same land. This, if true, certainly exhibited a claim by one party under the authority of the government of the United States, which was contested by the other party on the ground of a want of such authority. In the settlement of this controversy, it is true, the laws of the State of Illinois might be invoked by one party or both; but it would still be no less true that the authority of the United States to make the grant relied on would necessarily be called in question. We are, therefore, of opinion that the ground of removal now referred to presented a case arising under the laws of the United States, and is within the purview of the act of 1875."

Ib. p. 410.

This decision is in point in the case at bar.

So in Hardin vs. Jordan, 140 U. S., 371, where the same questions were involved as in Mitchell vs. Smale, and where the two cases were both decided on the same day,—both opinions being by Mr. Justice Bradley,—it is obvious that this court passed upon the same jurisdictional question both as to this court and the court below.

See also authorities cited and questions argued in brief for plaintiff in error on motion of defendants in error to dismiss. (pp. 6 to 14.)

That motion has been passed to be submitted with the case, and we take it for granted that the briefs on the motion on both sides will be considered in passing upon the jurisdictional question.

6. Counsel for defendants in error insists, however, that the Supreme Court of Iowa decides the case upon a clear question of fact independent of the Federal questions upon which Schlosser relies. He asserts that the court below "found as

a fact that the so-called Mud Lake was not a lake, never had been a lake and was swamp and overflowed land"; (See his reply brief on motion to dismiss, p. 1.)

Even if that were so the case of

French Glenn Live Stock Co vs. Springer, 185 U. S., 54,

conclusively sustains the jurisdiction of this court. There it was found in the state court that

"If the east and west exterior lines were extended north indefinitely they would not touch or intersect the margin or border of the lake, but would leave it entirely to the east thereof."

This court said, opinion by Mr. Justice Shiras:

"As the case went off in the Oregon courts on this question of fact, it may be questionable whether any matter of Federal law is left open for our revision. However, as the plaintiff in error contended, in the courts below and in this court, that a proper construction of the survey and patents gave riparian rights covering the land in dispute, and that it was not competent to overcome such rights by evidence affecting the legal import of the plats and patents, we think a Federal question is thus presented.

"For the reasons already given, we think that, while the plats are conclusive as to the meander line, and while *if there was a lake abutting on or to the north of the lots, the plaintiff in error would take all land between the meander line and the water, and all accretions*, it was competent for the defendant to show that there was not at the time of the survey nor since, any such lake, and to contend that, in such a state of facts, there could be no intervening land and no accretion by reliction."

Ib. 54.

It is vain to argue, as is done on behalf of defendants in error that "an examination of this authority discloses the fact that the question of jurisdiction was not raised in that case except as suggested by Mr. Justice Shiras in the opinion."

For, as we have seen, it is elementary that on every writ of error or appeal the first fundamental question here is that of jurisdiction, and it must be determined by the court, whether propounded by counsel or not.

It follows that if the court below had, as claimed, decided as a question of fact that there never was any lake where the government surveyor located what is now Mud Lake, this court would still have jurisdiction on writ of error.

But the Supreme Court of Iowa decided no such thing.

The statement of the matter by the counsel for defendants in error shows this. He says (page 2, of reply brief on motion):

"The question the Supreme Court had to decide was as

stated in their opinion 'whether there was a body of water upon section 30 proper to be meandered. * * We do not intend setting out the testimony on this point. * * From a careful reading of it we reach the conclusion there was no such body of water.'"

That is, "there was no such body of water" *proper to be meandered.* That was a legal conclusion as we have pointed out, and a conclusion which the court below was without jurisdiction to make in view of the Government survey and plats.

Nor did the court below deny the existence of a permanent lake. It simply denied that the permanent portion of the water *was as extensive* as depicted by the government surveyor, and thus attempted to review his discretion, survey and plat upon that ground. It says, "In wet seasons, doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water *of any considerable extent existed there.*"

The very field notes of the new survey, as we have pointed out, show a permanent body of water of very considerable extent on section 30. Was this also subject to review by the court below? It seems idle to us, in view of the authorities, to claim that the court below decided the case on any question of fact, or any independent ground not involving a Federal question. The case falls rather under the decision of this court, cited and quoted from by the learned counsel in his reply brief on the motion, at page 7, as follows:

"When, indeed the question decided by the state court is not merely of the weight and sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon the question of Federal law, the decision may be reviewed by this court."

Dower vs. Rogers, 151 U. S., 658.

The court below held that the legal effect of the evidence—as bearing upon the government survey, field notes and plats,—matters arising under Federal laws, and authority exercised under the United States,—was that the lake was not "proper" or "necessary" to be meandered. This ripped up and abrogated the government survey, field notes and plats which were part of the Anthony patent as much as though incorporated therein; and having thus nullified that portion of the patent, the court below decided against plaintiff's title and right as riparian owner specially set up and claimed by him under the portion of the patent thus nullified. Whether the court below could thus review the discretion of the government surveyor in making a survey in the field, under then existing circumstances, and could review the discretion of the land department in approving the survey, and issuing a patent based thereon, and thereupon deny plaintiff's title as riparian owner,

are questions purely of Federal law and of a title claimed under Federal statutes and authority exercised under the United States. Those questions are clearly reviewable here, where plaintiff's title thus set up is thus denied.

In the above case of Dower vs. Rogers the question was whether a ledge containing gold-bearing rock was known to be valuable for mining purposes at the time a town-site patent was issued. If it was known, it was excluded from the patent; if not so known, title to it passed under the patent. The Supreme Court of California decided the legal question involved under the Federal laws correctly. This court said:

"There can be no doubt that the decision of the Supreme Court of the State in this respect was correct. It is established by the former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them, and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. (Page 663.)

It was found by the trial court in an action of ejectment, as a matter of fact, that at the date of the town-site patent the ledge was not known to be valuable for mining purposes. And on this finding of fact the trial court and the Supreme Court of California gave judgment against the claimant in hostility to the town-site patent.

This court said:

"The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision in matter of fact was erroneous, and contrary to the weight of the evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this court." (Page 663.)

This must obviously be true in an action at law. None the less the case was not dismissed for want of jurisdiction. On the contrary, the judgment below was affirmed. It was said;

"The case now before us is in an action of ejectment, which was submitted to the Supreme Court of the same State, according to the local practice, upon findings of fact and a statement of evidence by an inferior court of the State. From the foregoing reasons and authorities, it follows that this court can not review the decision of the state court *upon the question of fact* whether

the ledge, at the time when the town-site patent took effect, was known to be valuable for mining purposes; and the only question of Federal law in the case having been rightly decided by that court, its judgment is *Affirmed.*" (Page 672.)

It is difficult to understand why this decision should be cited in opposition to jurisdiction in the case at bar

In the case at bar the decision below

"Is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court."

Shively vs. Bowlby, 152 U. S., 10.

7. Under the Iowa practice in equity, on an appeal the case is tried *de novo* by the Supreme Court, and its judgment is final.

Butterfield vs. Wilton Institute, 85 Ia., 404;

"On the trial of an equity case on appeal this court examines the entire record, to determine the decree that should be entered, and the findings of the district court are no limitation upon its course of procedure. It considers the case anew, and directs judgments in accord with its own findings, except that, where one party indicates, by not appealing, that he is satisfied with the judgment, it will not be modified in his favor."

Smith vs. Knight, 88 Iowa, 280.
West vs. West, 90 Iowa, 43.

"Under the constitution, the cause, when before the court, at the former term, was tried *de novo* in this court. This being so, it must ordinarily follow that the successful party, if he asks it, is entitled to a decree in this court. Such has been the practice ever since the adoption of the constitution."

First Natl. Bank vs. Banker, 60 Iowa, 133.

As to the practice of directing a judgment below in suits in equity after trial *de novo* in the Supreme Court that tribunal said.

"As the judgment will affect the title to real estate, it seems to us that the final judgment should be entered in the district court. We, however, recognize the right of either party to a judgment in this court, if such course is deemed best. We will, however, remand the cause to the district court, with directions to enter a judgment in accordance with the opinion."

Hait vs. Ensign et al, 61 Iowa, 727-728.
Fenton vs. Way, 40 Ia. 199 S. C. 44 Ia, 439.

In such cases the writ of error issues to the Supreme Court of the state and not to the inferior tribunal.

Atherton vs. Fowler, 91 U. S., 145.
Mower vs. Fletcher, 114 U. S., 217.

We think this court has jurisdiction of all of the matters argued above, and we submit that the judgment of the Supreme Court of Iowa ought to be reversed.

CHAS. A. CLARK,
GEO. E. CLARKE.
For Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NO. 175.

GEORGE SCHLOSSER, *Plaintiff in Error,*

—vs—

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

APPENDIX TO BRIEF OF PLAINTIFF IN ERROR.

DECISION OF COMMISSIONER OF GENERAL LAND OFFICE, DATED AUGUST 27th, 1894.

GEORGE E. CLARKE, CHAS. A. CLARK,
For Plaintiff in Error.

E
J. H. B.
81948-1894

F. F.
J. V. W.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., August 27, 1894.

ADDRESS ONLY THE
COMMISSIONER OF THE GENERAL LAND OFFICE.

Hon. W. B. Allison,
U. S. Senate.

Sir:

I am in receipt of your letter dated July 31, 1894, transmitting one addressed to you from Mr. J. W. Cory of Spirit Lake, Iowa, of date July 24, 1894, inclosing what purports to be a copy of a decision by the Supreme Court of the State of Iowa, in regard to certain land in section 19, township 97 north, range 34 west, 5th P. M., Iowa, shown upon the official plat in this office, approved June 22, 1858, to be covered by a portion of a meandered lake.

With your letter, official letters "E," dated April 9, and May 3, 1892, addressed to you, were also returned, which were in reply to letters from Mr. Cory, dated March 22 and April 23, 1892, in regard to the survey of certain land embraced within the meandered lines of said lake, locally known as "Palo Alto Lake," in sections 19, 20, 29 and 30 of said township and range.

In his letter to you Mr. Cory states that over two years ago he prepared a plat or rather survey of the land and attached it to an application for the survey thereof and forwarded it to this office; that in the tract of land which is in dispute there are over 1000 acres of high, rolling prairie land, which as shown upon the plat, "made by the Government Surveyor in 1855 or 1857, is marked water and is claimed that this land is a part of Lost Island Lake in Palo Alto County;" that "the Land Commissioner may claim that it is a part of the lake and you can silence his objections by showing him this clause which will settle that question without a doubt," suggesting that if you wish, he will prepare a bill if you will indicate what would be proper and right.

In your letter transmitting the papers it is stated that the land has never been drained or surveyed, and your friend desires to have some legislation which will enable him to purchase the land and wishes you to prepare a bill for that purpose. You therefore request that the matter be examined and information furnished you on the subject, and, if practicable, you request that this office suggest a proper bill, concluding by referring to the fact that you had some correspondence with this office on the same subject some years ago.

The matter referred to in the copy of decision by the Supreme Court of the State of Iowa, decided May 26, 1894, entitled "Grant et al. v. Hemphill et al., submitted by Mr. Cory, appears to have been brought before the court on appeal from decision by the district court of Palo Alto County, and involves "the greater part of what is claimed to be section 19, "township 97, range 34, in Palo Alto County," within the meandered lines of the lake above referred to, and appears to be a part of the land, the survey of which is desired by Mr. Cory. It is stated in said copy of decision by the State Supreme Court that:

"This is a suit in equity, by which the plaintiffs claim title to and possession of certain land, and they demand that said title and possession be quieted as against the defendants. A writ of injunction was invoked and granted, by which the defendants were restrained from taking the possession of the land in dispute. The district court entered a decree dismissing the plaintiffs' petition and they appeal. The Chicago, Milwaukee & St. Paul Railway Company intervened in the action, claiming to be the owner of the land as part of its government land grant, and the petition of intervention was dismissed. The intervener appeals. Affirmed.

Soper, Allen & Morling, for plaintiff appellants. Geo. E. Clark for intervener appellant. J. W. Cory, for appellees."

In reply, I have the honor to state that in 1890, Mr. Cory addressed several letters to this office and was advised in office letter "E" dated October, 30, 1890, that an examination of the official plat of the survey of township 97 north, range 34 west, Iowa, showed, *that the alleged unsurveyed land was embraced within the lines of a meandered lake upon which the public surveys had been duly closed, and that "it is held by this office and heretofore affirmed by the department that there is no law authorizing the survey and disposal of lands embraced within the lines of meandered lakes*; hence no applications to that end will be approved."

Prior to this, namely, on October 11, 1890, the Register of the U. S. Land Office at Des Moines, Iowa, transmitted a plat and field notes of a private survey of said land, executed by J. T. Painter, county surveyor of Clay County, Iowa, saying that the land was perhaps, many years ago, partially under water from the lake, but is now good farming land; that certain persons had applied to that office to enter portions thereof under the Homestead and Timber Culture laws, but that he hesitated about permitting the entries and asked instructions in the matter.

He was advised that this office declined to recognize the survey made by J. T. Painter and that no entries of said land would be permitted. The plat and field notes of Mr. Painter's survey were returned to the Register with official letter "E" dated October 28, 1890. This plat is doubtless the plat referred to in Mr. Cory's letter to you, as being on file in *this*

office, showing the alleged "1000 acres of high, rolling prairie land."

In official letter "E" addressed to you dated April 9, 1892, in reply to one from Mr. Cory dated March 30, 1892, addressed to you, referring to the action of this office in declining to entertain an application for the survey of the land to the end that it might be disposed of as public land of the United States, Mr. Cory asked that an act of Congress be passed authorizing a survey of the land to the end that his clients might have the first right of entry, and you requested this office to send you a form of bill that would cover the case.

In reply, this office in letter "E" dated April 9, 1892, addressed to you referred to the fact that the lake had, according to the official plat, been meandered, and the lots bordering thereon had long since been disposed of by the Government in accordance with the plat, and in view of the decisions by the U. S. Supreme Court, rendered May 11, 1891, in the cases of Hardin vs. Jordan and Mitchell vs. Smale, 140 U. S., 371, 406, the Department holds that the United States has no title to any lands which may exist within the area of such meandered lakes, formed since the original survey of the townships embracing the same, where the lands or lots bordering upon the lakes had been disposed of by the Government in accordance with the official plats; therefore it would appear that if a law was enacted of the character suggested by Mr. Cory it would interfere with vested rights, consequently this office deemed it unadvisable to cause to be prepared the form of bill suggested.

Further information was sought on the subject by Mr. Cory, through you, and in official letter "E" dated May 3, 1892, addressed to you, reference was made to Mr. Cory's letter to this office dated April 25, 1892, in which he alleged that the land was never a part of "Palo Alto Lake" and never was embraced therein, and that the decisions of the U. S. Supreme Court referred to did not apply to the case; also to his letter dated November 12, 1890, transmitting the application of W. L. Hemphill and others (which was informal), for the survey of the land, and to office letter "E" of December 3, 1890, addressed to him in reply.

It was further stated in said letter to you of May 3, 1892, that:

"In view of the foregoing and the details expressed in official letter "E" to you of April 9, 1892, I can only add for Mr. Cory's further information that it is apparent that the land to which he refers is embraced within the area of the lake as *represented* upon the official plat, and as the lands bordering upon the lake have long since been disposed of by the Government in accordance with the official plat, this office is debarred, under the decisions of the U. S. Supreme Court, referred to in said

letter "E" to you of April 9, 1892, from taking any action looking to the survey and disposal of such land."

The lake is situated in townships 96 and 97 north, ranges 34 and 35 west, 5th P. M., Iowa. It is not, however, designated on the plats by name. It covers, according to the official plats parts of sections 5 and 6 of township 96 north, range 34 west; sections 19, 20, 29, 30, 31 and 32 of township 97 north, range 34 west; sections 1, 2, 11, 12, 13 and 14 of township 96 north, range 35 west and sections 25 and 36 of township 97 north, range 35 west, 5th P. M., Iowa.; a narrow portion of the lake extending into section 18, T. 97 N., R. 34 W., 5th P. M., Iowa, does not appear to have been meandered and segregated from the public domain; neither does that narrow portion thereof which, according to the official plat extends into sections 26, 27, 28, 35 and 36, appear to have been meandered, consequently, according to the record, it has been disposed of by the Government with the legal subdivisions of the sections within which it is situated.

The records in this office further show that lots 1, 2, 3, 4 and 5 of section 19, lots 1, 2, 3, 4, 5, 6, and 8 of section 29, lots 2, 3, 4, 5 and E. ½ NW. ¼ section 20, township 97 north, range 34 west, and lots 2, 3, 4 and 5 and NE. ¼ NW. ¼, SW. ¼ of NW. ¼ and NE. ¼ of NE. ¼ of section 25, township 97 north, range 35 W., Iowa, bordering upon said lake, were patented to the State as swamp and overflowed land on May 15, 1862, Patent No. 2.

It will be noticed that in the copy of the decision by the Supreme Court of the State of Iowa, reference is made *only* to that portion of the land in question in section 19, township 97 north, Range 34 west, 5th P. M., Iowa, situate east of said lots 2, 3, 4 and 5 of the section, which lots are shown by the records in this office to have been patented to the State as swamp and overflowed lands. It is stated therein that the plaintiff, Eaton, claims to be the owner of lots 1 to 5 inclusive "by a proper line of conveyances from the Government down to James Grant, deceased, and by a contract of purchase from said Grant dated April 1, 1890." * * That "before he made his contract with Grant he entered on that part now in dispute, without any authority from any one, and broke up and put some of the land in cultivation," and that "after he made his purchase of the lots, he claimed the whole of the section, because he was the owner of the lots, and they were bounded on the east by the meandered line, and he had the right to the land between the meandered line and the waters of Lost Island and Mud or Palo Alto Lakes. A large number of witnesses were examined with reference to that part of the section which is platted as under water. We will not set out the evidence in detail. It appears from a very decided preponderance of evidence that the land in controversy is not now, and probably never was, any part of a lake. It is true that some of the witnesses testify that

the inlet of Mud Lake extended up into the land. But there is no evidence that at or near the time of the survey, or since, there has been any body of water anywhere on the land upon which to base a meander line." * * * * * * * * * *

"Mud Lake" like "Palo Alto Lake" is not shown upon the official plats. They simply show one meandered lake of considerable size, in the locality above described.

The State Supreme Court in speaking of the meander line also says that: "It is well understood that a meandered line is not regarded as a line of boundary. It is supposed to be along the shore of a body of water and to follow the windings of the stream or lake and the sinuosities of the banks. In such case, and where it appears that the government intended to sell all the land, to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant to the water's edge. Kraut vs. Crawford, 18 Iowa, 549. But no such condition is found under the evidence in the case at bar."

"There is not now and has not been, any body of water upon which to locate a meandered line." * * * * * * * * * *

It thus appears that while the evidence before the State Supreme Court seemed sufficient to satisfy it that there was no water in section 19, T. 97 N., R. 34 W., 5th P. M., before or since the subdivisional surveys in the township in 1857, it also appears that there is at the present time some water within the meandered lines of said lake as established by the deputy surveyor in 1858, for as above stated the court, on page 2 of the copy of decision submitted, in speaking of the claim of Eaton to land east of the meander line in section 9 says that, "he claimed the whole of the section, because he says he was the owner of the lots and they were bounded on the east by the meandered line, and he had the right to the land between the meandered line and the waters of Lost Island and Mud or Palo Alto Lakes."

In the conclusion of the decision the court holds that said land in section 19 east of the meander line of lots 1 to 5 inclusive, and shown by the official plat to be covered by water "is part of the unsurveyed domain of the United States, to which no one can obtain title, except through the regular government methods adopted by the general government of the disposition of the public lands." But, possibly this decision is not final, and the matter yet remains to be decided by a higher tribunal, namely, the U. S. Supreme Court.

In the case of Hardin vs. Jordan, 140 U. S., 401, reference is made to the cases of Davis vs. Weibbold (139 U. S., 507), and Moore vs. Robbins (96 U. S., 530, 533, 534), wherein the question as to the previous disposal of the lands was acted upon. It was held in the decisions that "if the lands had been previously disposed of the Department has no jurisdiction over them." Mr. Justice Miller, speaking for the court, stated as follows:

"With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. . . . ."

In the case of Mitchell vs. Smale (140 U. S. Reports, 413) referring to the practice by the Government, heretofore prevailing, of making new surveys and grants of the beds of lakes, after selling and granting the lands bordering thereon, *or represented so to be*, the following definition of "*an official plat of survey*" is given, viz:

"The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

In view of the foregoing and in view of the decisions by the U. S. Supreme Court, this office again declines to entertain an application for the survey of *any* land which may exist within the meander lines of said lake, to the end that it may be disposed of by the Government as public land of the United States, and cannot therefore, recommend any legislation which may affect the interests of the adjacent land owners to said land; hence I deem it inexpedient to suggest any form of bill to be offered in Congress, with regard to the subject, as requested by you.

The papers received with your letter are returned herewith.

Very respectfully,

EDW. A. BOWERS,
Acting Commissioner.

A certified copy of this decision is filed with the clerk.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 6 1905
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NO. 175.

GEORGE SCHLOSSER, *Plaintiff in Error,*

—vs—

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

POINTS AND INDEX BRIEF FOR PLAINTIFF IN ERROR.

By CHAS. A. CLARK.

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

POINTS AND INDEX BRIEF FOR PLAINTIFF IN ERROR.

By CHAS. A. CLARK.

I.

This suit involves the south half of a certain section 2 in Palo Alto County, Iowa.

The plaintiff below, who is plaintiff in error here, by his petition in equity specially sets up and claims title to the land under and by virtue of a certain patent issued by the Government in 1874 to one Anthony, his remote grantor.

This patent conveyed to Anthony two meandered lots along the south line of the section, "according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General, * * * with the appurtenances thereof unto the said John A. Anthony, and to his heirs and assigns forever." (Record p. 120.)

These lots front on a non-navigable lake on the north; they are a portion of a tongue of land extending into the lake

about a mile at the time of the government survey in 1855 and 1857; this lake was meandered out as shown by the government plats and field notes, the meander line on the north of the Anthony lots extending from a point on the west line of the section to a point on the south line near the southeast section corner. (Record p. 11.)

On the face of the plat and field notes, the lake on the north was clearly a natural object constituting the northern boundary of the lots.

Plaintiff's title to the two lots, while formally put in issue, was sustained by the court below, and does not admit of question. The real controversy is as to the legal effect of the Anthony patent as to riparian rights and title along and in the lake.

II.

Title under this patent as far north as the shore of the lake with accretions and relictions is clear. Title to the center of the lake, which would include the claimed south half of section 30, depends upon the law of Iowa. There is no statute of the state which in terms affects the question. Plaintiff asserts that the Supreme Court of Iowa never has decided this common law question, and that this court will therefore follow its own decision in Hardin vs. Jordon, 140 U. S., 371, which carries title under the patent to the center of the lake.

Anthony entered the lots as a homestead in 1869. His patent was issued under that entry. He and his grantees, including plaintiff, have always maintained the riparian rights and title now claimed. In 1893 a certain "squatter" went upon the land between the meander line and the lake, claiming it as government land subject to homestead entry. Schlosser promptly brought suit to establish his title and it was sustained by the Supreme Court of Iowa by a decision rendered December 13, 1895.

Schlosser vs. Cruickshank, 96 Ia., 414.

From 1890 to 1894 efforts were made to secure action by the Land Department allowing homestead entries, by ordering a re-survey, or by preparing a bill to be presented to Congress, but that Department steadily and consistently held that having patented the lands under the public surveys it was without jurisdiction and could sanction no further action in the matter. (See decision of Commissioner, of Aug. 27, 1894, printed and filed with Brief of plaintiff in error herein.)

The record shows that in 1898 Mr. E. B. Evans entered into a contract with Palo Alto County for a survey and selection of swamp land in Sections 29 and 30, for an undivided half interest to all swamp lands thus secured. (Record p. 89.)

Mr. Evans had been Register of the United States Land Office at Des Moines, Iowa, from May 29, 1894, to June 30, 1897. (See Brief p. 71.)

Thereafter, June 25, 1898, the Secretary of the Interior approved a re-survey of lands in section 30, including the land in controversy, and lands in other sections. Under this re-survey three lots on the south half of section 30 were selected and patented to the State and County as swamp land. These lots defendant Hemphill claims under quit claim deed from Evans and executory contract with the County.

Two lots of the re-survey of south half of section 30 containing 101 acres were entered by defendant Ryan as a homestead September 19, 1899. (Record p. 5.) This is the land laying between the meander line of plaintiff's lots and the shore of the lake to which the Supreme Court of Iowa quieted plaintiff's title in Schlosser vs. Cruickshank, *supra*.

The record shows (page 78, exhibit 23,) that Ryan's application to enter these lots as a homestead was made August 30, 1898, and that he was represented by Mr. E. B. Evans. It may probably be safely assumed that it was a part of the same speculative venture shown by Mr. Evans' agreement with Palo Alto County relative to securing swamp lands.

It will be seen at a glance that the question for determination is as to the legal effect of the Anthony patent which had its inception in 1869, as against this speculative venture, having its inception in 1898.

III.

As to the land between the meander line of plaintiff's lots and the shore of the lake, that falls within the rule tersely stated in French-Glenn Company vs. Springer, 185 U. S., 54: "*the plats are conclusive as to the meander line, and if there was a lake abutting on or to the north of these lots, the plaintiff in error would take all land between the meander line and the water, and all accretions.*"

The court below admitted the existence of the lake and said: "The meandered lake which gives rise to this controversy is called Mud Lake, and as must be manifest from what we have said *lies north of plaintiff's land.*" * * * * "He does not seek to extend his north line to the shore of the lake, but to the half section line, which did not appear on the original plat, for with the exception of a very small tract on the northwest corner of the section, *the lake was shown to cover that whole sub-division outside of plaintiff's two lots.* The half section line certainly does not mark the shore line of any body of water at present or heretofore existing. If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and

an existing permanent lake proper to have been meandered, we might perhaps reach a conclusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was, is far south of the half section line according to all the testimony." * * * "The fact that plaintiff claims beyond the shore line when taken in connection with the testimony going to show that the *greater part* of such body of water was but temporary in character, is sufficient to convince us that no meander line should ever have been run here." Record 127-8.

That there was a lake to the north of the lots at the time of the government surveys in 1855 and 1857, and that it remains there today, is conclusively shown.

See Decision Commissioner, Appendix p. 5, for full description of lake.

And see brief pp. 45, 53.

Field notes and plat of original survey have effect of deposition, and they are uncontradicted. Brief pp. 75-76.

Presumption from these after sales by government based upon them, and after long lapse of time, is conclusive.

This being so, how can plaintiff be deprived of the land between the meander line and the shore of the lake covered by Ryan's homestead entry? The court below accomplished this end by holding that this land had been patented *under the swamp land grant*, pursuant to the Barber re-survey of 1898.

The court below, in its statement of the case, sets forth that under the re-survey are claimed "lots 12 and 13 by defendant Ryan. These claims are founded upon conveyances from Palo Alto County under a patent issued to the state under the Swamp Land Grant of 1850, and which is based upon the re-survey of 1898." (Record p. 126.) Its decision giving Ryan the land between the meander line and the shore of the lake is based wholly upon the Swamp Land Grant, and nothing else.

As to Ryan, there is no such issue in the case. He claims solely and only under a homestead entry. (See his answer with exhibits 2 to 5). Furthermore, the lots claimed by Ryan were not reported as swamp under the re-survey (Record p. 18.) and there is no pretense anywhere in the record that they were swamp land, or were ever patented as such.

As to this, the court below simply framed an issue and decided it with no semblance of fact, and, it might be added with no semblance of law, upon which to base its decision.

IV.

Having embarked on this sea of error, it seems to have been easy to frame other issues not made by the parties themselves as grounds for depriving plaintiff of the land claimed

by Ryan between the meander line and the shore of the lake.

The plaintiff specially set up that "said lots were meandered by the government surveyor, *and said meander lines run with reference to a lake then existing* in part upon said section and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation between said meander line and the lake; that subsequent to the filing of said survey and plat the United States sold said land and issued patent thereto to one John A. Anthony; that by mesne conveyances the land has been transferred to this plaintiff; plaintiff purchased said lots relying upon the fact that the Government had platted and sold said lots without any reservation between the meander line and the lake." (Record p. 1.)

As to this Ryan said in his answer, and he said nothing more: "The defendant denies that such meander lines were run with reference to a lake *then existing* in part upon section 30, Township 97, Range 34." (Record p. 2, bottom.)

No question was raised as to whether the lake then existing was permanent; nor whether it was "proper" or "necessary" to be meandered if it did exist at the time of the survey.

The one question presented for determination was *whether the lake did or did not exist at the time of the survey.*

If it existed, but was wrongfully meandered, either because too shallow, or because temporary, or because of gross fraud or error as to its location, or if the meander line was not correctly run, that was matter in avoidance of a definite portion of the description and boundaries of the grant from the government under which plaintiff claimed, and should have been distinctly set up in avoidance, and sustained by distinct proof.

Brief, Div. IV, p. 21 to 23; also pp. 53-4.

Nevertheless, the court below in addition to setting up for Ryan a supposititious issue as to the swamp land grant, also set up for him other issues equally foreign to the pleadings.

1. That the lake was not proper or necessary to be meandered.

2. That the meander line was not correctly run.

If these matters had been set up by defendant's answers, plaintiff would have been entitled by demurrer to have tested their sufficiency as matter of law.

It must then have been held that his title under the Anthony patent could not be collaterally assailed as to these matters for,

1. Whether proper or necessary to meander the lake was confided to the discretion of the surveyor in the field, and

that discretion as thus exercised was approved by the land department. On this record, which stood unquestioned for thirty-three years and was over and over again upheld by the department, the government sold lands and granted titles. That this could not be called in question as to such discretionary matters, see Brief pp. 48 to 52. And see opinion of Mr. Justice Field in Knight vs. Land Association, 142 U. S., 205-6, and 211-12 quoted, Brief p. 75.

2. If the clear rule of law as to this had been disregarded, then plaintiff would have been entitled to call for distinct proof, *directed to the time when the survey was made*, to show that it was not necessary or proper to meander the lake, or that the meander line was not correctly run; and he would have been entitled to an opportunity to introduce proof on his part to sustain the survey (which shows upon it face the absurdity of such issues to impeach public surveys in matters of discretion), and he would also have been entitled to be heard in argument in the trial court and the Supreme Court as to the sufficiency of the evidence and the rules of law as to these questions. Of all these rights he has been denied. The assumption of trying such issues is nothing less than farcial—but does it become any less farcial when the appellate court injects such suppositious issues into the case for the first time, adopts its own conjectures as evidence, and, without hearing or argument, deprives plaintiff of his landed estate upon the potentiality issues which might have been raised but were not?

And finally, if it be conceded that these collateral issues against the Anthony patent could be made, and that they might for the first time be raised in the Supreme Court by that learned tribunal itself, it is still established beyond doubt that the lake was proper and necessary to be meandered and that the meander line was "correctly run". For the only evidence of conditions at the time of the survey is the field notes and plats, which, as we have seen, are entitled to the weight of a deposition. The long lapse of time gives great additional weight to these ancient muniments of title. There is no conflicting evidence in the case—nothing which may not be harmonized with the plats and field notes when lapse of time and conditions changed by the industry of man are considered.

Mud Lake was then a part of the single lake extending into four townships. See letter Secretary of Interior, Record p. 75, Brief pp. 44 and 45 and Barber re-survey there quoted. Also decisions of Commissioner, App. 5. "Mud Lake is not shown upon the official plats. They simply show *one meandered lake of considerable size* in the locality above described." App. 6.

The west line of section 30 was surveyed in 1855—*a dry year*. Brief 14, Record 33. Then a meander post was set on south side of the lake, and 42.88 chains north a like post was set

on the north side of the lake. Record 120-121. Brief 5. The lake was therefore 171.52 rods wide at that point.

At the time of the Barber re-survey in 1898 the same width was shown by the re-survey. Brief 7, Plat, Record 73.

The other lines of section 30 were surveyed in 1857. That was a wet year. Brief 14 and 15, Record 53. The whole section except the Anthony lots on the south side and a meandered lot in the north-west corner was then covered by the lake which extended south upon section 31 and 32. See plat, Record 11, Field notes, Brief 6 and Record 56, 113 and 121.

The Barber re-survey shows that a rise of two feet in the lake would submerge the same portion of section 30 in 1898. Brief 7, Record 81. And the witnesses show without conflict that the lake had at that time receded more than 3 feet since earlier days. Brief 15, Record 15 and 46.

There is, hence, no ground in the record to warrant the legal conclusion that in 1855 and 1857 the lake was not proper or necessary to be meandered.

But the decision below illustrates what will happen if the courts on their own motion and surmise, forty years after the event, may review the discretion excercised in making government surveys.

V.

The attempt to abrogate plaintiff's title to the land between the meander lines and the lake is not only outside the pleadings, but it is in direct conflict with numerous controlling decisions of this court which hold that the meander line is conclusive and can not be set aside or called in question. See cases Brief 20 and 52.

Even in the case of a fictitious and fraudulent survey th meander line laid down is conclusive.

Security &c. Co. vs. Burns, 193 U. S., 182.
Brief 63, bottom.

The only question is whether the meander line is a boundary or whether a natural object with reference to which it is run is the true boundary. It is uniformly held by this court and there is not a case to the contrary in its decisions, that where a lake, river, or body of water is meandered, such natural objects, and not the meander line is the true boundary. And this rule has been many times declared by the Supreme Court of Iowa. See cases Brief 21.

Schlosser vs. Cruickshank, 96 Iowa, 18.
Quoted Brief 51, 58 to 60.

The case of Mitchell vs. Smale, 140 U. S., 412, 413, 414, is very persuasive in this case. There, as here, it was contended

that a tongue or protruberance of land extending into the meandered lake warranted a re-survey and subsequent patent depriving the original riparian patentee of the land. Quoted, Brief 61, 62.

Speculators, as land increased in value, to start vexatious litigation, if such attacks are sanctioned, were foreseen by the prophetic eye of this court. In this case they have ceased to be prophecy. They are here making the very attack denounced in the Mitchell case.

The re-survey and attempted disposition of the land there under are absolutely void acts.

Cases Brief, 24, 25, and 61.

The cases cited in the opinion of the court below, Record p. 128, as authorizing the re-survey under which defendants claim hold precisely the reverse of the proposition.

Cragin vs. Powell, 128 U. S., 691, holds

"That the power to make and correct surveys of the public lands belongs to the political department of the government and that, *whilst the lands are subject to the supervision* of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient." (pp. 698-699.)

"It is conceded that this power of supervision and correction by the Commissioner of the General Land Office is subject to necessary and decided limitations. Nor is it denied that, when the Land Department has once made and approved a governmental survey of public lands, (the plats, maps, field notes and certificates all having been filed in proper office,) and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased, in good faith, from the government *against the interferences or appropriations of corrective re-surveys made by that department subsequently to such disposition or sale.*" (pp. 699-700.)

It was pointed out in that opinion that the Land Department itself refused to make re-surveys conflicting with interests in lands already sold and patented. (Ib. 698.) And such was the rule maintained by the Department as to the survey of the very land in controversy in this case. (See App. pp. 3, 4, 5 and 7.) The re-survey in Cragin vs. Powell was accordingly held void, and the bad faith and speculative venture in such re-survey were fittingly condemned by this court.

So in, Michigan L. &. L. Co. vs. Rust, 168 U. S., 595, it was said, quoting New Orleans vs. Paine, 147 U. S., 261,

"*Until the matter is closed by final action*, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon final hearing."

And it was added by this court;

"It was within the power of the land Department, *at any time prior to the issue of a patent*, of its own motion, to order a re-survey, and correct by that any mistakes in the prior survey."

Niles vs. Cedar Point Club, 175 U. S., 300,

Is a case where it was held that the meander line was a boundary line and that the lands beyond it did not border upon a body of water and were therefore excluded from the patent, and no rights thereto having passed under the patent, that they were subject, not to re-survey, but to survey and sale as lands undisposed of belonging to the United States. (See Brief, p. 64.)

There was no possible ground therefore for depriving plaintiff of the land between the meander line and the shore of the lake which was held by the Supreme Court of Iowa to belong to him in the case of Schlosser vs. Cruickshank, supra.

VI.

There remains the question as to whether the Anthony patent conveyed title not only to the shore of the lake, but to the center of the lake.

This question of riparian ownership is a common law question to be accepted here as decided by the State Supreme Court.

See cases, Brief 55, and especially latest statement of the rule by this court in Hardin vs. Shedd, 195 U. S., 518-19, there quoted.

As there declared, the land under the lake belonged to the United States when the grant under the Anthony patent was made. The rule does not mean that the beds of such lake passed to the State on its admission to the Union, "but is simply a convenient, possibly the most convenient, way of determining the effects of the grant."

This common law question of the effect of a grant from the government fronting upon a non-navigable lake, never has been decided by the Supreme Court of Iowa, and hence the common law as declared by this court in Hardin vs. Jordon, 140 U. S., 371, and subsequent cases, must govern this court in the case at bar.

While there is no express statute of Iowa governing riparian rights, or declaring the common law with reference thereto, yet certain statutes of Iowa would seem to result in giving effect to that rule, as held in Hardin vs. Jordon, *supra*, and in carry-

ing title under the Anthony patent to the center of the lake. Thus by section 2 of the Revision of Iowa of 1860, bringing forward the like provision in a prior code, it was provided:

"The state possesses sovereignty co-extensive with the boundaries referred to in the preceding section, subject to such rights as may at any time exist in the United States, *in relation to the public lands*, or to any military or naval establishment within the above limits."

And by section 2209 of the revision, bringing forward section 1201 of a prior code it was provided;

"Every conveyance of real estate passes all the interest of the grantor therein unless a contrary intent can be reasonably inferred *from the terms used*."

These provisions were carried forward as respectively, section 2 and section 1931 of the 1873 Code of Iowa.

And they still remain the statute law of Iowa.

Code of Iowa, 1897, section 2 and 2914.

Furthermore section 6 of the Act of Congress, approved March 3rd, 1845, for the admission of the state of Iowa into the Union distinctly specifies in paragraphs, 1, 2, 3 and 4 what lands belonging to the United States shall be vested in the State of Iowa and paragraph 5 of that section provides,

"That the five foregoing propositions (as to public lands) herein offered are on the condition that the legislature of the said state, by virtue of the powers conferred upon it by the convention which framed the constitution of the said state, shall provide by an ordinance, irrevocable without the consent of the United States, that *the said state shall never interfere with the primary disposal of the soil within the same by the United States*, nor with any regulations congress may find necessary for securing the title in such soil to the bona fide purchasers thereof."

The legislature of Iowa by act approved January 15, 1849, accepted these provisions and provided "that the state of Iowa *will never interfere* with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof."

At the time of the Anthony patent the "*land under the lake as well as that surrounding it belonged to the United States.* * * * * "In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general laws of the state so far as its conveyance are concerned." * * * * "The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passes to the state on its admission, or otherwise, apart from the swamp land act, but is simply a con-

venient, possibly the most convenient way of determining the effect of a grant."

Hardin vs. Shedd, 190 U. S., 518-19.

It is therefore difficult to see, under the fundamental law of Iowa on its admission into the Union, as well as under its general statute law, how title to the center of the lake which was in the United States when the Anthony patent was issued failed to pass to Anthony under that patent.

But be this as it may, nothing short of an express and distinct decision of the Supreme Court of the state with the fundamental law of Iowa and the statute law of Iowa standing as it does can limit the legal effect of the patent under which plaintiff claims in the case at bar.

There is no such decision of the Supreme Court of Iowa. Any claim of such decision will probably be based upon

Noyes vs. Collins, 92 Iowa, 567-8-9, and
Noyes vs. Board of Supervisors, 104 Iowa, 175.

Those were both cases where a county in Iowa had taken title from the Government to a certain section 15 under the swamp land grant. A portion of the lake bed in controversy was a part of this section 15. The conflict was between grantees of the county or between the county and its grantee. It appeared that the county, notwithstanding the sale of lots along the shore of the lake, holding title as it did to the bed thereof, had, "from time to time for many years, surveyed portions of these lake beds and has platted the same in lots and sold said lots to various parties."

It was held in the first of these cases, the land having been sold by metes and bounds, one line of which was "by the meanders of said Dry Lake to the south line of section 15," that the meander line was a boundary line under the facts and circumstances of the case.

Apparently the court held the description "*by the meanders of said Dry Lake*" to be a boundary line, and a limitation upon the extent of the grant from the county, citing Murphy vs. Copeland, 58 Iowa, 409. That was a case where the description held to be a boundary and a limitation of the grant was "*up the west bank of Pine Creek.*" When that case was first before the Supreme Court of Iowa that court said:

"If the *banks* of a creek can be regarded as extending to the *middle*, so that the words "up the west bank" mean the same as the words *up the east* bank would, then the words *west bank*, as a call in the deed loses all significance. * * * * The words *up the west bank*, taken in their common import, do necessarily mean that the stream was excluded."

Murphy vs. Copeland, 51 Iowa, 516.

So, by like reasoning, "*by the meanders of Dry Lake,*" would exclude the lake, and that seems to have been the real ground of the decision of the Noyes-Collins case. The difference between such a description and that of the Anthony patent, "lots two and three of section thirty * * * * according to the official plat of the survey of said land * * * with the appurtenances thereof" is obvious.

The citation of the Wisconsin case, Deitrich vs. Ry. Co., 42 Wis., 248, and the quotation from it, "The rule that the title of the riparian owner upon a natural lake or pond does not extend beyond the natural shore appears to be very generally—almost universally—recognized," decides nothing. This was dictum in the Wisconsin case as to non-navigable lakes and ponds, for that case involved riparian rights on Lake Michigan, and involved nothing else; and it was equally dictum in the Noyes-Collins case beyond the exact facts of that case. It seems idle to claim that a question of private grant, decided on a peculiar boundary, and special facts, can determine the effect of a government patent as to title in the bed of a non-navigable lake, where it is certain that title to the bed of the lake passes under the patent, and the only question is whether the *patentee* takes such title.

Noyes vs. Board simply follows the Noyes-Collins case, as declared by the court at the end of the opinion.

For these two cases see Brief, pp. 29-30.

The real point of these two decisions is that in both cases the meander lines were held to be lines of limitation and of boundary. In neither case did plaintiff take to the shore of the lake, and in neither case does it appear that the meander lines and the shores of the lake were identical.

Nor do other decisions of the Supreme Court of Iowa decide the question under discussion.

Rood vs. Wallace, 109 Iowa, 8 to 14, was a case where the court expressly declared that the rights of no riparian owners were involved, but that no re-survey could prejudice their interests, (9 and 10). (Brief pp. 31 and 32.)

Carr vs. Moore, 119 Iowa, 152,
Grant vs. Hemphill, 92 Iowa, 218,

are cases where it was held there were no bodies of water to meander. (Brief pp. 33 to 37) and in both cases it was held that "the government patents did not confer any ownership beyond the meander line." (p. 159, Carr vs, Moore.)

Schlosser vs. Cruickshank, 96 Ia., 425,
Ladd vs. Osborne, 79 Ia., 93,

are cases where plaintiffs claimed land between the meander line

and the shore of the lake, and got it. Nothing more was involved. (Brief p. 37.)

These cases summarized. (Brief 39 to 44.)

In two of the latest of these cases, Carr vs. Moore, and Ogden vs. Buckley, the question of title to beds of lakes in Iowa is treated as open and undecided. (Brief p. 38.)

The theory propounded *arguendo* in Rood vs. Wallace, 109 Iowa, 14, that if the public survey "is conclusive it amounts to a segregation of the lakes and river beds from the public domain, and, as a general rule, confirms title thereto in the state," need not be discussed. This theory is not a decision; it is not even dictum; it is directly in conflict with the decision of this court that "the rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passes to the state on its admission, or otherwise, apart from the swamp land act."

Hardin vs. Shedd, 190 U. S., 519.

There being, then, no decision of the Supreme Court of Iowa as to what the common law rule is touching title to beds of non-navigable lakes, and as that question must be decided in the case at bar, it seems to follow inevitably that this court will follow its own decisions as expressed in Hardin vs. Jordon, *supra*, and subsequent cases.

VII.

The swamp land grant was long prior to the Anthony patent. If any portion of the lake meandered out in front of these Anthony lots was in fact swamp land under the intent and meaning of that grant, it may be conceded that it might in apt time have been claimed and secured by title superior to that under the patent. The public survey showed the land to be lake, and not swamp. The Anthony patent was an adjudication by the Land Department that the land was not swamp in fact. *Prima facie* it conveyed title to the center of the lake. See Brief pp. 64 to 66, and cases Ib.

Section 30 was fully surveyed. The corner posts and quarter post were set, so that lands therein might have been claimed as swamp at any time after the survey' There was, hence, neither necessity nor power to make a re-survey upon which to base the swamp land claim set up in the case at bar.

Cragin vs. Powell, 128 U. S., 691.

And it has been so decided by the Department as to this very survey. (See decision, App. herein, and Brief 66, 67.)

The county of Palo Alto, in fact, made its selections and included therein more than twenty sections in the township

where the land in controversy is situated, but it included no lands in section 30. (Brief pp. 67 to 69.) This is shown by the report of the register of the state land office of Iowa for the year 1875, of which report the courts take judicial notice. (Cases, Brief pp. 70, 71.) Selections after 1864 were barred by act of Congress of March 12, 1860. (Brief pp. 72 to 74.)

And in any case the swamp land claim was barred by *laches* in its assertion both under the decision of this court and those of the Supreme Court of Iowa. (Brief pp. 76 to 79.)

McCormick vs. Hayes, 159 U. S., 348, and Rogers Locomotive Co. vs. Am. Emigrant Co., 164 U. S., 559, are submitted as persuasive and conclusive authorities on this question.

The attempted selection of the lands in section 30 as swamp in 1898 was an after-thought based upon the speculative venture with Mr. Evans, and will not be looked upon with favor by a court of equity. (Brief pp. 71-72, and cases there cited.)

The re-survey upon which both the homestead claim of defendant Ryan and the swamp land claim of defendant Hemphill are founded is void, and can in no manner affect the rights and title of plaintiff under the Anthony patent. (Brief pp. 58 to 64, and cases there cited.)

VIII.

As to jurisdiction. Questions arising under the swamp land grant are the same as those considered by this court, and upon which the judgments of the Supreme Court of Iowa were reversed in,

> McCormick vs. Hayes, 159 U. S., 348,
> Rogers Locomotive Co. vs. Am. Emigrant Co., 164 U. S., 559.

All of the questions involved in the case at bar are as to the legal effect of the Anthony patent specially set up and pleaded by plaintiff in error. The decision below was against his claims thus made, and in precisely similar cases the jurisdiction of this court has been maintained. Brief pp. 81 to 84, and cases there cited.

There was no finding of fact which disposed of the case below without reference to the Federal questions involved. Brief pp. 80, paragraph 3, and 84 to 87, and cases there cited.

CHAS. A. CLARK,
For Plaintiff in Error.

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SEP 24 1904
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA, DEFENDANTS

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

E. B. EVANS, *Attorney for Defendants.*
H. C. EVANS, of *Counsel.*

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

Number 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN AND PALO ALTO COUNTY, IOWA, DEFENDANTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR.

To George E. Clark, Attorney for George Schlosser, Plaintiff in error, Algona, Iowa:

Sir:—You will please take notice that the defendants in error, W. L. Hemphill, Richard T. Ryan and Palo Alto County, will, on Monday, October 10th, 1904, at the opening of Court on said day, or as soon thereafter as counsel can be heard, move the Supreme Court of the United States at the court room of said Supreme Court at the Capitol in the city of Washington, D. C., to dismiss the writ of error to the supreme court of Iowa heretofore on or about the ..... day of December A. D. 1903, sued out of the said Supreme Court of the United States by said plaintiff in error above named and for such other and further relief as to the court may seem just.

You will further take notice that said motion will be based upon the ground that said Supreme Court of the United States has no jurisdiction of said cause above entitled for the reason:—

First: That this cause does not involve a federal question; that is to say, there has not been drawn in question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any state on the ground that such statute is repugnant to the constitution, treaty or laws of the United States, the decision whereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under the constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

Second: If any federal question was involved in this cause when the same was pending in the Supreme Court of Iowa, there was also pending before said Supreme Court of Iowa in this cause another question not federal which was also raised in said cause and decided by said Supreme Court of Iowa against the plaintiff in error and the decision of the latter question was sufficient, notwithstanding the federal question (if any) to sustain the decision of the Supreme Court of Iowa irrespective of what its decision (if any) may have been upon such federal question (if any.)

Further take notice that at the same time and place said defendants in error will move said Supreme Court of the United States for such other and further order or relief as the defendants in error may be in equity and in good conscience entitled to, and as to the said Supreme Court of the United States may seem just.

Further take notice, that said motion will be made upon all the records, files, and papers of said cause above entitled, on file

in said Supreme Court of the United States, which will be referred to in support thereof.

E. B. EVANS,
Attorney for Defendants in Error.
H. C. EVANS AND EVANS & EVANS, *of Counsel.*

Service of the foregoing notice and of the following motion and brief acknowledged and accepted and a copy of each thereof received on this ..... day of August A. D. 1904.

Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

Number 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN AND PALO ALTO COUNTY, IOWA, DEFENDANTS IN ERROR.

MOTION TO DISMISS.

Comes now W. L. Hemphill, Richard T. Ryan and Palo Alto County, through their undersigned counsel and move the court to dismiss the writ of error to the Supreme Court of Iowa heretofore, to-wit:—on or about the ..... day of December A. D. 1903, sued out in this cause and for such other and further order or relief as to the Court may seem just and in support of this motion assigns the following

SPECIFICATIONS FOR GROUNDS OF MOTION.

The motion to dismiss the writ of error made above is based upon the ground that this court has no jurisdiction to review the judgment of the Supreme Court of Iowa heretofore rendered in this cause, for the reasons:—

First: That this cause does not involve a federal question; that is to say, there has not been drawn in the question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any state on the ground that such statute is repugnant to the constitution, treaty or laws of the United States, the decision wdereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under, the constitution or any treaty or statute of, or commission held, or authority exercised, under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

Second: If any federal question was involved in this cause when the same was pending in the Supreme Court of Iowa there was also pending before said Supreme Court of Iowa in this cause another question not federal which was also raised in said cause and decided by said Supreme Court of Iowa against the plaintiff in error and the decision of the latter question was sufficient, notwithstanding the federal question (if any) to sustain the decision of the Supreme Court of Iowa irrespective of what its decision (if any) may have been upon such federal question (if any).

STATEMENT OF CASE.

To enable this Court to pass upon and determine and decide the foregoing motion the case will be sufficiently stated by setting out from the transcript, the pleadings, and the decision of the District Court of Palo Alto County, Iowa, and of the Supreme Court of the State of Iowa, and the assignment of errors made in this Court by the plaintiff in error, all of which are as follows:—

The plaintiff in error being the plaintiff in the District Court of Palo Alto County and the Supreme Court of the State of Iowa, on the 13th day of January, 1900, filed in the District Court of Palo Alto County, Iowa, the following

PETITION.

That the plaintiff is the absolute owner in fee simple of lots 2 and 3 in section 30, T. 97, R. 34, that the said lots were surveyed by the government and platted and the record of said survey and plats were duly returned to the General Land Office at Washington, D. C., and became a part of the records of said office; that said lots were meandered by the Government surveyor, and said meander lines run with reference to a lake then existing in part upon said section and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation between said meander line and the lake; that subsequent to the filing of said survey and plat the United States sold said land and issued patent thereto to one John A. Anthony; that by mean conveyances the land has been transferred to this plaintiff; plaintiff purchased said lots relying upon the fact that the Government had platted and sold said lots without any reservation between the meander line and the lake; about 1899 the defendant without the consent of the plaintiff entered into possession of all the land between the meander line and the lake proper and are now claiming title to said land, which claim is adverse to title of plaintiff.

That the plaintiff's title includes all of the land embodied in the south half of said section and his title is complete to all of said land claimed adversely by the defendants. Plaintiff further states that the defendants other than Palo Alto County are engaged in committing waste on said real estate by cutting and

carrying away the timber thereon; that the said defendants are insolvent; wherefore the plaintiff prays that the fee simple title to all of the real estate described be established and quieted in plaintiff; that the defendants and each of them be forever barred and estopped from having any title or interest in said real estate adverse to the plaintiff and that the defendants be enjoined from cutting and clearing away any of the timber standing thereon; that in the event the court should determine the plaintiff is not the owner of all the land included in the south half of said section that the court then determine the extent of the boundary of the plaintiff's land and that the court decree the plaintiff is the fee simple owner to all the land between the meander line and the bank and edge of the lake as meandered, as well as the land between the meander line and the south line of section 30 and that title be quieted in the plaintiff and the defendants barred from having any interest or title in said real estate adverse to this plaintiff, and defendants be enjoined from cutting and removing timber thereon, and such other relief as may seem equitable and a writ issue removing the defendants from said premises and placing plaintiff in possession.

On the 4th day of March, 1900, the defendant in error, Richard Ryan, filed in the District Court of Palo Alto County the following

ANSWER.

This defendant denies each and every allegation in plaintiff's petition not hereinafter specifically admitted; as to whether the Government issued patents to lots 2 and 3 and the plaintiff is the owner of said land the defendant asks the court to require strict proof; as to whether said lots were surveyed and platted by the Government and said survey and plats filed in the General Land Office, and as to whether said lots were meandered defendant has not sufficient knowledge to form a belief,

and denies the same; the defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30, T. 97, R. 34. Defendant states that lots 2 and 3 of said section contains 99.80 acres, as shown by the Government survey and plats of said lots; that the patent from the United States and the warranty deeds as set forth in plaintiff's petition in describing said land only purported to convey the number of acres in each lot as shown by the Government survey and plats, and that neither said patent nor deeds purport in any manner to convey the land embraced in lots 12 and 13, being a part of the land in controversy, and defendant denies that said patent or deeds conveyed any title whatever to the land embraced in lots 12 and 13. Defendant states that on the 8th day of March, 1898, the Secretary of the Interior directed the Commissioner of the General Land Office to cause to be surveyed certain unsurveyed land in sections 19-20-29 and 30, T. 97, range 34, and sections 25, 36, T. 97, R. 35; that the Commisioner of the General Land Office caused the unsurveyed land in said sections to be surveyed; that said survey was made on the 2nd to the 20th days of April, inclusive, of the year 1898; that there was surveyed by said Government surveyor 1230 acres of land in the aforesaid sections; that the plat of said survey and the subdivisions of said 1230 acres of land, together with field notes, were duly made by said surveyor and filed in the General Land Office at Washington, D. C., in accordance with law; the land so surveyed became subject to disposal under the laws of the United States for the disposal of public land; under direction of the Secretary of the Interior the register and receiver of the United States land office at Des Moines, Iowa, published notice as required by law that said 1230 acres of land would be open to entry on the 30th day of August, 1898; that prior to the 30th day of August, 1898, defendant had established his residence upon lots 12 and 13 of said section; on the 30th day of August,

1898, he filed his written application to enter the land embraced in said lots as a homestead, together with the evidence required by law showing his qualification to make homestead entry of Government land; that his application was approved and the defendant paid the required fees and commission to the receiver of said land office; his entry was allowed and became of record, and that said entry is now of record and in full force and effect, and the defendant is now engaged in living upon, cultivating and improving the land embraced in his homestead entry, being a part of the land plaintiff seeks in his petition to have title decreed in plaintiff. Defendant states that the land embraced in his homestead entry is adjacent to and attached to and is in the same condition as the land involved in the case of Grant vs. Hemphill decided by the Supreme Court of the State of Iowa on the 26th day of May, 1894 (92 Iowa, 218), wherein it was held that "all the land in dispute is a part of the unsurveyed domain of the United States to which any one can not obtain title except through the regular Government method adopted by the General Government for the disposal of public lands." The defendant states that this court has no jurisdiction over the subject matter of this suit; that is over lots 12 and 13 of said section for the reason that the legal title to the land embraced in said lots is in the Government of the United States, subject to the rights of this defendant to finish and complete his residence and cultivation of said lots, as required by the law.

Defendant attaches hereto copy of his homestead application marked Exhibit "A," copies of his affidavit attached to said application marked Exhibits "B" and "C," copy of homestead receipt marked Exhibit " D," copy of homestead entry book and of tract book of the Government Land Office marked Exhibits "E" and "F," all of which are made a part of his answer.

Defendant states that on the 30th day of August, 1898, the plaintiff George Schlosser, recogniing the validity of the sur-

vey made in the year 1898, as herein set forth, filed application to enter lots 13 and 14 of said section, being a part of the land in controversy, as an adjoining farm homestead; that his application was rejected by the register and receiver, notice of which was served on plaintiff; that thereupon said Schlosser filed in said land office a contest against the homestead entry of this defendant; that trial was had before the Register and Receiver upon the contest brought by the plaintiff, the plaintiff and this defendant appearing thereto; the Register and Receiver rendered their decision in favor of this defendant; within the time allowed for appeal the plaintiff, George Schlosser, appealed from said decision; that upon said appeal the case is now pending before the Commissioner of the General Land Office at Washington, D. C.; that no decision thereon has been had. Certified copy of docket entry of said case is hereto attached marked Exhibit "G" and made a part hereof. Wherefore, the defendant prays that the court will require plaintiff to reply to the allegation of this defendant's answer as set forth in Exhibits "A" to "G," inclusive, and that upon the admission of the plaintiff of the truth of said facts or upon the proof of the allegations contained in said exhibits the court will dismiss the plaintiff's bill for want of jurisdiction and that the plaintiff's petition may be dismissed with costs against the plaintiff and for general relief.

On the 4th day of March, 1900, defendants in error, W. L. Hemphill, and Palo Alto County, filed in the District Court of said Palo Alto County the following joint

ANSWER.

(As to lots 2 and 3, and the Government survey mentioned in plaintiff's petition; as to survey made under authority of the decision of the Secretary of the Interior of March 8, 1898, mentioned in the answer of Richard T. Ryan, the answer of

these defendants are identical with that of Richard T. Ryan.) For further answer these defendants state that lots 11, 14 and 15 section 30, T. 97, R. 34, as shown by the Government survey made from the 2nd to the 20th day of April, inclusive, for the year 1898, is swamp and overflowed lands and was included in the grant of September 28, 1850, to the State of Iowa, made by the government of the United States wherein all the swamp and overflowed land in the State of Iowa was granted to the State of Iowa, and said lots were included in the grant of the legislature of the State of Iowa wherein all swamp and overflowed land in Palo Atlo county was granted to Palo Alto county. And that the defendant, W. L. Hemphill, has purchased from said county said lots, and has paid a part of the purchase price therefore; that the legal title to said lots remain in the United States as patent has not yet issued; that the equitable title is in Palo Alto county subject to a contract of sale of defendant, Hemphill; that on the 30th day of August, 1898, said county by its duly authorized swamp land agent selected said lots as swamp and overflowed land and filed such selection in the United States land office at Des Moines, Iowa; that on the same day the plaintiff herein made application to enter said lot 14 as an adjoining farm homestead, his said application being filed in the United States land office at Des Moines, Iowa; that by order of the Register and Receiver of said land office a trial was had before said officers, of which the plaintiff herein had notice; that said officers rendered their joint decision, holding each of said lots to be swamp and overflowed and approving the same to the State of Iowa and Palo Alto county; that said decision was forwarded to the Commissioner of the General Land Office on appeal of the plaintiff herein; that the Commisioner of the General Land Office affirmed the decision of the Register and Receiver; that thereafter the Secretary of the Interior affirmed the decision of the Commissioner and has approved each of said lots for

patent; that there only remains the ministerial act of preparing and executing the patent from the Government of the United States to the State of Iowa and from the State of Iowa to Palo Alto county to establish the legal title in said county. These defendants deny that this court has jurisdiction over the subject matter of this suit. Wherefore, the defendants pray that the petition of the plaintiff be dismissed and judgment rendered against the plaintiff for costs and for general relief.

On the 11th day of April, 1900, plaintiffs in error filed in the District Court of Palo Atlo County the folowing

REPLY.

Plaintiff for reply to the answer of Richard T. Ryan denies every allegation not otherwise admitted or plead to. Plaintiff denies that defendant went into possession of a portion of the land on or about August 1898, and has resided thereon since said time; he denies that land upon which defendant resides is a part of the land claimed in this action by the plaintiff; he admits that he made application to enter a portion of this land as stated; that said application was made under advise of counsel that it would not waive or bar his title obtained by him thereon if he obtained the same by virtue of the patent issued to said Anthony through whom he claims title, and that it would be cheaper to obtain the claimed outstanding title by entry. That all of the proceedings with reference to the re-survey of the land and opening the same for homestead was without authority or jurisdiction for the reason that prior theretofore the United States had caused section 30 to be surveyed and platted and thereafter sold and conveyed said land according to the official plat to John A. Anthony; that by said patent the United States parted with all its title to the land in controversy herein.

On the 11th day of April, 1900, the defendant in error, W. L. Hemphill, filed in the District Court of Palo Alto County the following

AMENDMENT TO HIS ANSWER.

That prior to the 29th day of April, 1900, the plaintiff had fenced and was in possession of the land described in the petition outside of the meander line, and had thereon a fence; that the defendants, Hemphill and Ryan, were claiming said land and the possession and ownership thereof as set out in their answers; that the plaintiff and this defendant had entered into an oral agreement whereby for the consideration of $25 then paid by the defendant to the plaintiff the plaintiff sold to this defendant said fences and relinquished to the defendant said land and all claims and demands of the plaintiff thereto, and thereupon the plaintiff executed to this defendant a written contract and receipt in words and figures as follows, to-wit:

"Ruthven, Iowa, 4-29, 1899.

"I hereby sell all my interest in the following fences on the "section line between sections 29 and 30 of two wires on what "borders up to Crookshank's. One on or near the county line of "about 80 rods and one starting on or near the half section line "on the west side of section 30, and running in an irregular "line to southwest corner of lot 4, section 30, of two wires. And "a three wire fence running from southwest corner of lot 4 to "half section corner on east line of section 30 to the said W. L. "Hemphill, all being in township 97-34 and 97-35, for the sum "of $25.00 in hand paid by the said Hemphill for possession of "land and fences.

"GEORGE SCHLOSSER."

That thereafter the plaintiff and this defendant entered into further oral argeement that the parties should have Leroy Grout,

county surveyor of Palo Alto county, run a boundary line between the land of the plaintiff and of the defendants in accordance with the meander line of the original Government survey, and that said line should be the boundary line between the land of the plaintiff and these defendants, and that division fence should be built upon the same; plaintiff should build half and the defendants half of said fence; that thereafter the said parties did procure said Grout to run said line, and thereafter built a portion of his half of said fence, and the parties thereafter occupied their respective premises and by reason of said agreement the meander line and the fence thereon has become and is the boundary and division line between the lands of the parties hereto.

On the 11th day of April, 1900, the defendant in error Richard Ryan filed in the District Court of Palo Alto county, Iowa, the following

AMENDMENT TO HIS ANSWER.

Richard Ryan amending his answer makes a part hereof all the allegations of Paragraph 12 of the amendment to the answer of W. L. Hemphill, and further shows that the land of this defendant, Richard Ryan, lies between the land of the defendant, Hemphill, in said amendment referred to. Further answering the defendant said that under and by virtue of the laws of the United States the defendants herein are the owners of the land in controversy herein; that defendants claim the ownership and possession of said lands by virtue of the acts of Congress, that prior to the several acts of the Land Department of the United States in the answer of the defendants referred to, said lands were public lands of the United States; that the State of Iowa and the courts and laws of Iowa had no authority or jurisdiction thereover; that only the court of the United States

and Land Department thereof have any jurisdiction of this controversy.

On the 11th day of April, 1900, plaintiff in error by way of reply to the answer and amendment to Palo Alto county and W. L. Hemphill filed in the District Court of Palo Alto county the following

REPLY.

Division 1. Plaintiff denies each and every allegation in said answer and amendment except admitted or plead to. With the explanation in this reply hereinafter stated, plaintiff admits that on the 30th day of August, 1898, he filed application in the United States land office at Des Moines, Iowa, to enter lot 14; that a trial was ordered by the Register and Receiver and had before said officers to determine the swampy or un-swampy character of said lot; that at said trial the plaintiff appeared with counsel; that the Register and Receiver rendered their joint decision, holding said lot as swamp land and approved the application of the State of Iowa and Palo Alto County; that the plaintiff appealed; that the Commissioner of the General Land Office affirmed the decision of the Register and Receiver; that the Secretary of the Interior approved the decision of the Commissioner, and approved said lot for patent; that there only remains the ministerial act of preparing and executing a patent from the United States to the State of Iowa and from the State of Iowa to Palo Alto county, conveying the legal title to the county. Plaintiff admits that on the 29th day of April, 1899, he entered into an oral contract with W. L. Hemphill for the sale of a fence; that said fence was not located on the south half of section 30. Plaintiff especially denies that there was any contract with reference to the possession of any part of the land in controversy; that he signed or executed the receipt set out in said

answer, but avers that he did sign a receipt for $25 for the purchase price of the fence; that if said paper set out bears the true signature of the plaintiff the last six words, to-wit: (for possession of land and fence) was inserted therein after the same had been signed and without plaintiff's knowledge and consent; that the instrument as it now appears is not the instrument signed by plaintiff. Plaintiff denies each and every allegation except the oral agreement of the boundary lines except he admits he had a conversation with said defendant with reference to ascertaining the lines of the Barber survey, and did agree if the defendant would employ Grout to run said lines, and if it was determined plaintiff's line did not exist further than the lines so surveyed by Barber he would pay half the expenses of said survey.

Division 2. As to the acts and proceedings in the Land Department of the United States plaintiff replies the same as in his reply to the answer of Richard Ryan.

On the 15th day of May, 1900, the defendants in error, W. L. Hemphill and Palo Alto County, filed in the district court of Palo Alto County the following

SUPPLEMENTAL ANSWER.

Pursuant to the re-survey of the lands described in the petition and in pursuance of the laws of Congress of the United States a patent for lots 11-14 and 15, in section 30, township 97, range 34, was on the 18th day of April, 1900, duly executed and issued by the United States of America to the State of Iowa under and by virtue of an act of Congress of September 28, 1850, granting swamp and overflowed lands to the State of Iowa, and the State of Iowa on the —— day of April, 1900, did execute and issue to the County of Palo Alto a patent for said lots; that prior to the commencement of this action and ever

since the defendant, Hemphill, has been in possession of said premises.

On the 22nd day of May, 1900, plaintiff in error filed in the district court of Palo Alto County the following

REPLY.

That the title and interest which the defendants claim to the alleged lots is barred in that the plaintiff and those under whom he calims title have been in open, notorious and adverse possession of said land more than ten years prior to the commencement of this action and ten years before defendants asserted any claim of title thereto, and that said possession has been continuous; that the defendants made no effort to assert title thereto and are barred by the statute of limitation.

On the 11th day of April, 1900, the case came on for trial before the district court of Palo Alto County and the following proceedings were had:

PLAINTIFF'S EVIDENCE.

EXHIBIT "A."

Being a certified copy of a patent issued by the United States to John A. Anthony for lots 2 and 3, section 30, T. 97, R. 30, containing 99.80 acres, dated October 10, 1897.

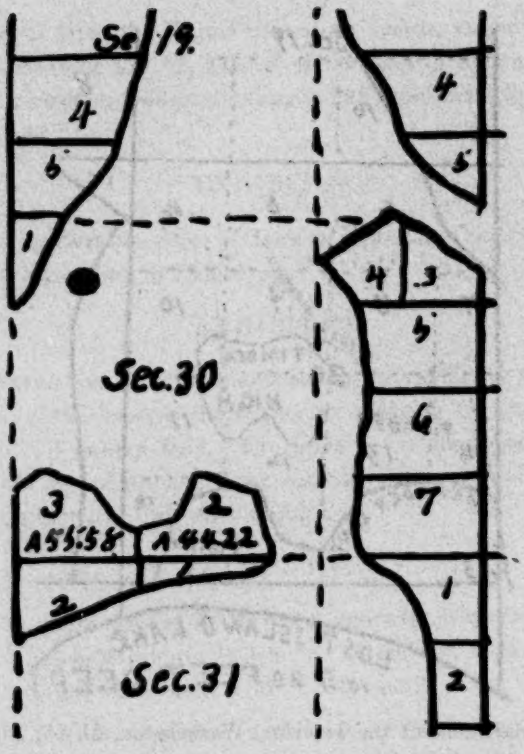
EXHIBITS "B", "C" and "D".

Being mense conveyances from John A. Anthony to Frank L. Given, from Frank L. Given to George Schlosser of the lands described in Exhibit "A".

EXHIBIT "E".

A plat of original Government survey in Sec. 19-20-29 and 30.

EXHIBIT "E"



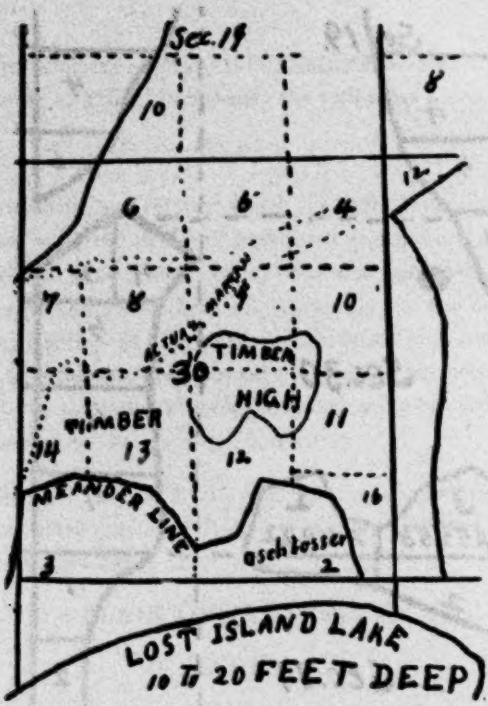
Plaintiff also offered evidence of a number of witnesses tending to show the condition of the land in controversy as to whether it was a lake of water or swamp or overflowed land.

DEFENDANTS' EVIDENCE.

EXHIBIT 2.

A plat of additional surveys in section 19, 20, 29 and 30, T. 97, N. R. 34 and 35. Authorized by the Interior Department March 8, 1898.

EXHIBIT 2.



"Department of the Interior, Washington, D. C., July 20, "1898. The above map of additional survey in T. 97, N. R. 34 "and 35, W. 5. P. M. Iowa is strictly comformable to all the "filed notes of the survey thereof on file in this office which have "been examined and approved.

"BINGER HERMAN,

"Commissioner and ex-officio Surveyor General for Iowa."

EXHIBIT 23.

Being certified copy of records of the register of homestead entries of the United States Land Office at Des Moines, Iowa, showing homestead entry of Richard T. Ryan for lots 12 and 13, section 30, T. 97, N. R. 34.

EXHIBIT 44.

Patent from the United States of America to the State of Iowa conveying lots 11, 14, 15, of the land in controversy together with other lands amounting to 298 acres under the swamp land grant.

EXHIBIT 45.

Patent from the State of Iowa to Palo Alto County conveying land described in Exhibit 44.

EXHIBIT 39.

Written contract of employment by Palo Alto County of E. B. Evans to represent the county in applying for survey and selection of swamp land. Providing for a compensation for such services of an undivided one-half interest of all swamp lands patented to Palo Alto County.

EXHIBIT 40.

Quit claim deed of E. B. Evans and wife conveying an undivided one-half interest in lots 11, 14 and 15, section 30, T. 97, R. 34 and other lands to W. L. Hemphill.

The defendants offered in evidence the testimony of various witnesses and exhibits as to the character of the land in controversy whether it was lake or swamp land.

On the 10th day of August, 1900, the district court of Palo Alto County rendered its decree, decreeing the title in fee simple to all the land in controversy to be in the plaintiff.

Within the time provided by the laws of the State of Iowa the defendants appealed to the supreme court of the State of Iowa, the case was fully argued before the supreme court of the State of Iowa, and on the 3d day of June 1902, the supreme

court of Iowa reversed the district court of Palo Alto County and rendered the following decision:

"George Schlosser

vs.

"W. L. Hemphill, Richard Ryan, et al., Appellants.

"Appeal from Palo Alto district court.

"This is an action in equity to quiet title to a tract of some "two hundred and ninety acres of land in the south half of sec- "tion 30, township 97, range 34, in Palo Alto County. Plaintiff "is the admitted owner of lots 2 and 3 forming a part of said "tract and containing about ninety-nine acres. According to "the original Government survey made in 1857, this land was "adjacent to a lake which was meandered, and the meander lines "were run along the north side of the said two lots. The re- "mainder of the land claimed lies between this meander line "and the alleged shore of the lake, and is the subject of the con- "troversy.

"The half section in question, that is, such part of it as lies "beyond the original meander line, was re-surveyed by the Gov- "ernment in the year 1898 and platted into 5 lots, of which lots "11, 14 and 15 are claimed by defendant Hemphill, and lots "12 and 13 by defendant Ryan. These claims are founded upon "conveyances from Palo Alto County, under a patent issued to "the State, under the swamp land grant of 1850 and which is "based upon the re-survey of 1898. Schlosser insists that the "meander line is not his boundary, it not marking the edge of "the lake, but that he is entitled to claim up to the east and west "half section line of said section."

There was a decree for plaintiff and defendants appeal.

E. B. Evans and Morling & Davidson, *for Appellants.*

Buck & Kirkpatrick and Carr & Parker, *for Appellee.*

Waterman, *Judge.*

Lots 2 and 3 which plaintiff admittedly owns, are bounded on the south section line and they extend almost across said section from east to west. Plaintiff's claim was once before presented to this court in an action of a similar nature to this, but against a different defendant. See *Schlosser vs. Cruickshank, 96 Iowa 414.* Plaintiff was then successful. But that was before the re-survey and issuance of a patent and the making of conveyance by the county. And more than this, in the other case Schlosser claimed title only to the actual margin of the alleged lake, while here he claims to the half section line, which was first run through this section by the re-survey of 1898.

It is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In the former case we found on the evidence then before us, that there was a tract of about one hundred acres between said line and the actual shore of the lake.

When a body of water is meandered, such lines are not run as boundaries, but merely for the purpose of defining the sinuosities of the shore and as a means of ascertaining the quantity of land to be paid for by the purchaser.

Schlosser vs. Cruickshank, supra, and authorities therein cited.

In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, the adjoining owner will usually take title to the actual shore line. And it may doubtless be properly conceded that no subsequent re-survey by the Government in the absence of fraud or error so gross as to be in the nature of a fraud in the original survey, could affect his title thereto.

Mitchell & Smale, 140 U. S., 819.

But where there is no adjacent body of water proper to be meandered the rule we have mentioned will not apply. In such

a case the meander line will be a boundary line, and one who purchases from the Government according thereto cannot claim title beyond it.

Grant vs. Hemphill, 92 Iowa, 218.

French-Glen L. S. Co. vs. Springer, 22 S. C. Rep. 563.

We have then to determine whether there was a body of water in section 30, proper to be meandered. As to what bodies of water should be meandered see *Lester's Land Laws (ed. 1860) 714.* We do not intend setting out the testimony on this point. It is quite voluminous and very conflicting. From a careful reading of it we reach the conclusion there was no such body of water. That there was swampy and low land in section 30 north of plaintiff's lots admits of no question and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there. The lake spoken of in *Schlosser vs. Cruickshank,* as being about two miles wide, three miles long and 10 to 18 feet deep and adjacent to his land is evidently Lost Island lake, which lies south of section 30 and nowhere touches it. The meandered lake which gives rise to this controversy is called Mud lake and as must be manifest from what we have said, lies north of plaintiff's land. How far, if at all, this mistake affected the conclusion in the Cruickshank case, we are not able to say, but that it was an error is clear from the fact that neither witnesses or counsel for plaintiff claim Mud lake to answer at all to the description so given. The confusion seems to have arisen from the fact that the Cruickshank case was submitted in connection with another case involving similar questions—*Caldwell vs. Jackson*—but which related to land bordering upon Lost Island lake, and the arguments were made in the latter case.

The case of *Grand & Hemphill* to which we have alluded

above involved Mud lake, as alleged on section 19, which of course adjoins section 30, on the north and the evidence in that case, in which it was found no lake existed adjacent to the land of the plaintiff in that action, seems to have been quite similar to what is relied on here in support of Schlosser's case. We are confirmed in our conclusion by plaintiff's present claim. He does not seek to extend his north line to the shore of a lake but to the half section line, which did not appear on the original plat for with the exception of a very small tract in the northwest corner of the section, the lake was shown to cover that whole sub-division outside of plaintiff's two lots. The half section line certainly does not mark the shore line of any body of water at present or hertofore existing. If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and an existing permanent lake proper to have been meandered, we might perhaps reach a conclusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was, is far south of the half section line according to all the testimony. Beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake.

Rood vs .Wallace, 109 Iowa 61.
Noyes vs. Board of Supervisors, etc. 104 id. 174.

The fact that plaintiff claims beyond the shore line when taken in connection with the testimony going to show that the greater part of such body of water was but temporary in character, is sufficient to convince us that no meander line should ever have been run here. Plaintiff's present claim and the facts and arguments in its support tend to clear the half section in question of any lake and indeed to remove such permanent body of water wholly from the map. We are further inclined to believe that when the meander line deviates so far from the true

shore as it does in this case from the bank of the body of water attempted to be bounded according to all the evidence and the concessions of counsel the error would be so gross as to warrant a re-survey.

Cragin vs. Powell, 128 U. S. 691.
Mich. L. L. Co. vs. Rust, 168 id. 589.
Wiles & Cedar Point Club, 175 id. 300.

While it is true that the significant question before us is the condition that existed when the original survey was made, and that attempt to show this must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters, yet it appears beyond question here that the meander line was not correctly run in the first instance, and we think it is satisfactorily disclosed that no body of water necessary to be meandered then existed where Mud lake is shown on the plat to be.

2. Plaintiff rests his claim of title also upon adverse possession. It is said he and his grantors have been in possession of the disputed tract claiming title thereto for much more than ten years prior to the beginning of this action—that the swamp land act of 1850 was a grant *in praesenti* and that the statute of limitations will run against the county. The grant of swamp lands which had been surveyed and platted was *in praesenti* and it has been said passed title to the State, and from the State such title passed to the counties by the act of the General Assembly.

Smith vs. Miller, 105 Iowa, 588.
Bailey vs. Callanan, 87 id. 107.
Am, Em. Co. vs. Fuller, 83 id. 599.

But it was an inchoate title only that passed under the act to the State. The legal title remained in the United States

until a patent was issued. *Odgen vs. Buckley*, decided at present term: *Rogers L. Works vs. Am. Em. Co., 164 U. S. 559; Mich. L. & L. Co. vs. Rust, supra.* Furthermore the swamp land act did not operate to convey any interest in lands unsurveyed at the date of its passage. A survey into legal subdivision is a necessary pre-requisite to the passing of title from the Government. *Boynton vs. Miller, 22 Iowa 579.* So long as title remained in the United States the statute of limitations would not run.

Durham vs. Hussman, 88 Iowa 29.
1 Am. & E. Enc. of Law 875.

and cases there collected. This land was not surveyed until the year 1898. Before it was laid out into legal subdivisions, neither State or County could make a selection or assert any title to it. See further on this point:

Iowa R. R. Land Co. vs. Adkins, 48 Iowa, 351;
Chicago, R. I. & P. R. R. Co. vs. Alfree, 64 id. 500.

In our opinion the plaintiff has no right to any other than the land patented to his grantor, and the decree of the trial court must therefore be

REVERSED.

Thereafter and within the time provided by law the plaintiff in error, George Schlosser, sued out his writ of error in the supreme court of the United States and in support of his appeal and his grounds therefore filed the following

ASSIGNMENT OF ERRORS.

1. Under the laws, statutes and decisions of the United States, the meander line is not the boundary line of lots sold by the United States, but is run for the purpose of conforming to the irregularities and sinuosities of creeks and lakes for the

purpose of ascertaining the amount of land for which the Government charged upon the sale thereof.

2. The court erred in holding and deciding in its said opinion and decision that plaintiff in error was not the owner of the real estate involved in said controversy.

3. The court erred in construing the laws of the United States not to convey title under the patents issued by plaintiff's grantor to lots 2 and 3 of section 30, township No. 97, range No. 34, west 5th P. M. Iowa.

4. The court erred in holding that under the swamp land act of September 28th, 1850 (9 Stat. at L. 520, Rev. Statutes. Sec. 2479 et seq.), and patents of the United States dated October 10th, 1874, that plaintiff's mesne grantor did not acquire title to the land in controversy.

5. The court erred in holding that the swamp land act of September 28th, 1850 (9 Stat, at L. 520 Rev. Statutes Sec. 2479 et seq.), did not convey title prior to the survey of the land in question into legal subdivisions.

6. The court erred in refusing to follow the decisions of the supreme court of the United States in construing the statutes of the United States as applied to meander lines.

7. The court erred in refusing to follow the decisions of the supreme court of the United States in construing the statutes of the United States as applied to lands included in patents issued by the United States.

8. The court erred in holding that a new survey of the lands in controversy could affect plaintiff's title acquire by patent from the United States dated October 10th, 1874.

9. The court erred in holding that there was any authority of law under the statutes and acts of congress authorizing a resurvey or further survey of land under the facts disclosed in this case.

10. Under the statutes and various acts of Congress in relation to surveys and sales of the public domain, the original survey as disclosed in this case, and the sale by the Land Department of the United States, and the patents issued by the United States in pursuance of such sale, conveyed title to plaintiff's grantor, and plaintiff, by mesne conveyance from such grantor, took title to the land in controversy, and in said judgment and decision the supreme court of Iowa erred in refusing to establish and quiet the title of plaintiff in error thereunder.

And thereupon, upon the foregoing assignment of errors, the said George Schlosser respectfully asks and prays that upon the writ of error granted upon his petition and for the review of the errors herein assigned that the said judgment and decision of the supreme court of Iowa may be reversed, and the action, decision and judgment of the said supreme court of Iowa may be set aside; and said George Schlosser will ever pray.

GEORGE E. CLARKE,

Attorney for George Schlosser, Plaintiff in error.

CHAS. A. CLARK, of Counsel.

The above and foregoing we think sufficiently states the case for the purposes of this motion to dismiss.

E. B. EVANS,

Counsel for Defendants in error.

BRIEF AND ARGUMENT UPON MOTION TO DISMISS.

The points relied upon by the plaintiff in error for a reversal of the decision of the supreme court of the state of Iowa are ten in number and are substantially set forth in the following proposition:

First: That under the laws, statutes and decisions of the United States a meander line is not the boundary line of lots

sold by the United States, but is run for the purpose of conforming to the irregularities and sinusoities of creeks and lakes for the purpose of ascertaining the amount of land for which the government charged upon the sale thereof.

The above point, seems to us, presents all the question involved in the ten assignments of error. Upon discussing this point we call attention to the fact that the fourth and fifth assignments of error made by the plaintiff in error is not based upon the record anl leads to a misapprehension of the record for the reason that the record discloses that the patent from the United States to Anthony, the plaintiff's grantor, was made by virtue of a homestead entry of said Anthony and was not issued and the land was not granted under the swamp land act of September 28th, 1850. Lots two and three, the land embraced in said patent to Anthony, was not swamp and overflowed land and never was claimed as such so far as the records in this case disclose.

The question of the plaintiff's right to the land in controversy depends upon the patent issued by the United States in 1874 to Anthony embracing lots 2 and 3 of Section 30, T. 97, R. 34, which patent discloses that there were 99.80 acres sold or disposed of by the Government to Anthony. If plaintiff succeeds in obtaining title to the land in controversy, it must be by virtue of the construction of this patent and the patent must be made to include the remainder of the land embraced in the south one-half of Section 30 and as we understand plaintiff's theory the patent should be so construed in order to protect the plaintiff as a riparian owner. In other words, that by virtue of said patent to the plaintiff's grantor he is entitled to all the lands between the meander line of his said lots and the half section line of section 30. This raises a question of fact as to whether there is or was a lake of water upon the south one-half of section 30 and the further legal question as to whether the

plaintiff is a riparian owner. There are the two crucial points involved in this case one a question of fact and the other a question of the laws of the State of Iowa pertaining to riparian ownership.

There is no question in this case involving in the slightest degree the acts of Congress or the laws of the United States under which Anthony obtained his title to lots 2 and 3. The only question being the location of the land so patented. In this connection we adopt the language of a decision of this court as it so aply expresses the crucial point involved in the plaintiff's claim:

"This court has repeatedly held that it does not warrant the "review of an adjudication upon a mere question of boundary. "The fact that the land to which the boundary relates is held "by a title derived from an act of congress does not change the "result. If the title be admitted, as recognized by the act, its "location upon the boundary is a subject wholly within the "cognizance of the state tribunals, and it is not within the power "of this court to review their action.

"The supreme court of Louisiana construed correctly the sev- "eral acts of Congress. The errors, if any were committed, was "in locating it upon the land, and in fixing the boundary. No "act of Congress was drawn in question."

Lanfear vs. Hinley 4 Wal. 209.

If a federal question is presented in the record of this case then every cause involving the title to real property where the litigants derive title under and by virtue of a law of the United States and wherein their right to the land was denied by a state supreme court could be reviewed by the supreme court of the United States regardless of the questions decided by the supreme court. As we understand it, the rule is that it is only where the statute under which the party received his title from the govern-

ment of the United States must be construed and passed upon that the federal question is raised, not in a cause such as the one at bar where no question is made or no construction is necessary of the act under which the plaintiff in error obtained his title, the only question being the extent of the boundaries of that title. We again quote from a decision of this court: "It "is a mere question of boundaries between two neighbors * * * "It is a question of fact depending on monuments to be found "on the ground documents in the land office or the opinion of "expert surveyors; * * * if the accident of the controversy that "both parties claimed title under the United States should be "considered as sufficient to bring it within our jurisdiction then "every controversy involving the title of such lands, whether it "involves inheritance, partition, devise or sale may with equal "propriety be the subject of examination by this court."

Moreland vs. Page, 20 Howard 523.

The jurisdiction of this court to consider this case involves the following questions:

First: Is there a federal question involved and has the decision of the federal question if any is involved, been against the validity of a treaty, or statute or an authority exercised under the United States; has the decision been in favor of the validity of a statute of, or an authority exercised under the laws of the state of Iowa which statute or authority is repugnant to the constitution, treaties or laws of the United States, or has the decision been against any title, right, privilege, or immunity specially set up or claimed by plaintiff in error under the constitution or any treaty or statute of, or commission held or authority exercised under the United States? If the answer to these questions is in the negative such answer ends this case.

Second: Could the case have been decided by the supreme court of Iowa without regard to the federal question? If the

answer to this question is in the affirmative it likewise ends this case.

"Whenever the power to enact a statute, as it is by its terms, "or is made to read by construction, is fairly open to denial "and denied the validity of such statute is drawn in question "but not otherwise."

Baltimore & Potomac R. R. Co., 130 U. S. 224.

"The validity of the authority must have been drawn in ques- "tion directly and not incidentally. The validity of a statute is "not drawn in question every time rights claimed under such "statute are controverted nor is the validity of an authority "every time an act done by such authority is disputed. The "validity of a statute or the validity of an authority is drawn "in question when the existence or constitutionality or legality "of such statute or authority is denied and the denial forms "the subject of inquiry."

United States vs. Lynch, 137 U. S. 285.

See also *Cook County vs. Calumet & Chicago Land Company, 138 U. S. 653.*

The question of the validity of the statute under which the plaintiff in error claims his title is not in question in this case. It is only a question of fact as to the boundaries of the land the plaintiff in error secured under that statute, that question of fact could be and was determined by the supreme court of Iowa without regard to the federal question. We now call attention to the decision of this court in the case of *Sweringen vs. City of St. Louis, 185 U. S. 45,* which case is very similar as to facts and legal questions as is the case at bar. In that case the plaintiff in error, being the plaintiff below, obtained a judgment in the state circuit court of the city of St. Louis for the recovery of certain lands. Upon appeal the supreme court of the state of Missouri reversed the judgment of the circuit court

and the plaintiff in error brought the case to this court by writ of error. The property was bounded on the east by the Mississippi river, the question involved in the case was whether plaintiff was entitled to the alluvium caused by the recision of the Mississippi river by virtue of a patent from the United States. The trial court held she was; the supreme court held she was not. In the patent of the United States conveying the land in controversy to plaintiff's grantor, the boundary lines of the land granted was described. It appeared in evidence that at the time patent was executed that the east boundary of the land described in the patent was several hundred feet west of the waters of the river, that at the time of the trial such boundary was 1500 feet west of the waters of the river. The plaintiff in error brought her suit of ejectment against the city of St. Louis; the city was using the land brought into existence by the recision of the waters of the Mississippi river as a public wharf. A motion was made in this court to dismiss the writ of error for lack of jurisdiction based upon the averment that there was no federal question involved. In passing upon this motion the supreme court said:

"In our judgment there is no federal question arising by "reason of plaintiff's claim under the patent put in evidence by "her as the source of her title to the land in question. With "reference to the first clause of Section 709 of the revised "statutes, it appears plainly that the validity of the patent has "never been questioned. Nor has the validity of any treaty or "statute of, or authority exercised under the United States, "been drawn in question. It is a pure question of the construc- "tion of the language used in the patent. Whether the land "granted therein reached the waters of the Mississippi river on "the east, or whether, according to the courses and distances con- "tained in the patent, the eastern limit of the land conveyed was "some hundreds of feet west of the river. It was really a ques-

"tion of facts as to how far east the measurements of the courses "and distances carried the boundary. There was no contention "made as to the authority of the Government to convey the land "to the bank of the river where the water was actually flowing, "if it choose so to do."

Sweringen vs. St. Louis, 145 U. S. 45.

In the case at bar we have the plaintiff in error claiming title to the land in controversy under and by virtue of a patent issued under the laws of the United States pertaining to the disposal of public lands known as the homestead law. The defendant in error, Richard T. Ryan, claiming a right to secure a patent from the United States under the same law and by virtue of his settlement upon the land and the allowance of his homestead entry. The defendants in error, Palo Alto County and W. L. Hemphill, claiming a portion of the land in controversy under and by virtue of the swamp land grant of September 28, 1850, and patents issued by the United States under that grant. It is not denied but what each and every law just mentioned was valid. We are not called upon to consider for one moment the validity of either statute. We are not called upon to consider its existence or its constitutionality or to determine its import or in any manner to interpret either of these laws. The one question involved in this case is the boundary line between the land patented to Anthony the grantor of the plaintiff in error and the land patented to the state of Iowa under the swamp land grant claimed by the defendants in error Palo Alto County and W. L. Hemphill, and the land embraced in the defendant Ryan's homestead entry.

As to the 8th and 9th assignment of error made by the plaintiff in error, we suggest that it is not competent to attack the decision of the Secretary of the Interior and the acts of his subordinate officers in relation to the survey of the public

domain in a collateral proceeding. The Secretary of the Interior is vested with wide discretionary power in reference to the determination of the character of land and of surveys of the public land. When he has decided, his decision is binding upon the courts, at least to the extent that they cannot be set aside and held for naught in a collateral attack.

Could the case have been decided by the supreme court of Iowa without regard to a federal question? If so, this court is without jurisdiction. The answer to this question is found in the decision of the supreme court. We have not set out for the purpose of this motion the record of the vast array of testimony produced in the trial of this case and considered by the supreme court on the question of fact as to whether there was a body of water upon which to base the meander line of plaintiff's lots; if there was in fact no body of water north of plaintiff's lots which could properly be meandered, then there is absolutely nothing upon which to base plaintiff in error's contention of riparian ownership. Days were spent in the trial court taking testimony of witnesses as to the so-called body of water designated as Mud lake. Expert surveyors were employed on both sides of the controversy. Scores of levels were taken on the land. Lines were run, maps introduced, old settlers were brought in to testify as to the volume of water upon said land, and after considering the entire case on this question of fact and announcing the rule in Iowa as to riparian ownership, the supreme court of Iowa said:

"We have then to determine whether there was a body of "water in section 30 proper to be meandered. As to what bodies "of water should be meandered see *Lester's Land Laws (Edition "1860) 714.* We do not intend setting out the testimony on this "point. It is quite voluminous and very conflicting. From a "careful reading of it we reach the conclusion there was no such "body of water. That there was swampy and low land in section

"30 north of plaintiff's lots admits of no question and in wet "seasons doubtless a large part of it was covered at times with "water, but we are equally clear that no permanent body of "water of any considerable extent existed there."

Thus we have a question of fact as to the character of land decided by the supreme court of Iowa which is absolutely conclusive of the entire matter. Even had we attacked the law under which the plaintiff claimed his title, and it was necessary to construe that law, yet if the supreme court of Iowa could have determined the matter without regard to that question having been raised, then our inquiry is ended and such a determination becomes a finality; but we have no such question. The law under which plaintiff claims his title is not to be construed; it is not attacked; his rights under the law are not denied; and so for both reasons discussed herein we submit the plaintiff has no standing in this court.

In conclusion we submit that the questions involved in this case and decided by the Supreme Court of Iowa against this plaintiff were: First, a question of fact in which it was found that there was no body of water north of plaintiff's lots upon which to base the meander line as run by the original surveyor. Second, that the distance between the meander lines of plaintiff's lot and the water line of the alleged lake was so great and the land lying between said water line and meander line was so much that the plaintiff could not, under the laws of Iowa, be possibly construed a riparian owner. Third, that the statutes of limitations of Iowa will not run against the grantees of the government of the United States under the swamp land grant before the land has been surveyed or selected. Neither of these three questions involve a federal question or a question which confers jurisdiction upon this court.

E. B. Evans,
Attorney for Defendants.

H. C. Evans and Evans & Evans of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

Number 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN AND PALO ALTO COUNTY, IOWA, DEFENDANTS.

ON MOTION OF DEFENDANTS IN ERROR TO DISMISS.

REPLY OF DEFENDANTS IN ERROR.

Believing that certain features of the brief of the plaintiff in error is misleading and not proper for consideration in the motion to dismiss, the indulgence of the court is asked to the end that the defendants in error may file and have considered in connection with their motion to dismiss this:

REPLY TO BRIEF OF PLAINTIFF IN ERROR.

The learned counsel for the plaintiff in error contends that a proper construction of the survey and patents to Anthony, the plaintiff's remote grantor would give riparian rights along Mud Lake, covering the land in dispute.

Counsel loses sight of the fact that the Supreme Court of Iowa found as a fact that the so-called Mud Lake was not a lake, never had been a lake and was swamp and overflowed land, thus bringing this case directly within the reason assigned in defendants in error's motion to dismiss, that is to say, if any federal question was raised in the pleadings or proceedings in the Supreme Court of Iowa, there was also raised and decided in that court a question of fact which made it wholly un-

necessary for the Supreme Court of Iowa to construe any federal question.

We take it as well settled that where a party aggrieved by a decision of the Supreme Court of a state sues out a writ of error to the Supreme Court of the United States and seeks to reverse the decision of the state court upon the ground that the decision of such court on questions of fact was erroneous and contrary to the weight of the evidence in the case, that this court will not assume or take jurisdiction of such question, and this is true however erroneous the decission of the state court as to fact may be. The learned counsel for the plaintiff in error seems to be especially aggrieved at the finding of the state court on the question as to whether there was in fact a lake of water upon or adjacent to the land in controversy. He has therefore set out in his brief a considerable portion of the evidence before the Supreme Court of Iowa including the length of time that various witnesses had known and been acquainted with the land in controversy, suggesting that there was no evidence as to the depth of the waters of the so-called Mud Lake at the time of the government survey in 1855, and calling attention to other evidence in the case. All of this evidence was before the Supreme Court of Iowa and was considered by that court and after giving it the weight and credit they deemed it entitled to, the unanimous decision of the court was that the land was swamp land and that there was no body of water upon which to base the meander line. The question the Supreme Court had to decide was as stated in their opinion "whether there was a body of water upon section 30 proper to be meandered. * * We do not intend setting out the testimony on this point. * * From a careful reading of it we reach the conclusion there was no such body of water." What did the Supreme Court decide, a federal question? No. A question of fact. Was it a lake of

water or was it swamp land? The Supreme Court of Iowa says "That there was swampy and low land on Section 30, north of plaintiff's lots, admits of no question and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there."

Counsel also cites the case of *Schlosser vs. Crookshank*, 96 Ia. 414, as supporting his contention that there was a lake of water upon the land in controversy upon which to base the meander line of the lots owned by the plaintiff in error. It is true that the land in controversy was the same land that was in controversy in the case of *Schlosser vs. Crookshank*, and it is true that in the former case the Supreme Court of Iowa decided in favor of the plaintiff, holding that he was riparian owner, but that case was decided in the erroneous belief by the Supreme Court of Iowa that the lake which they held in in the case of *Schlosser vs. Crookshank* was the basis for the meander line of plaintiff's lots, was Lost Island Lake, a lake two miles wide, three miles long and 20 feet deep, but they now find, and the truth is, that that lake lies south of Section 30 and does not touch plaintiff's lots at any point. This fact clearly appears in the decision of the Supreme Court of Iowa in the case at bar.

Page 127 of record.

Should the plaintiff in error be successful in this case he obtains title to 320 acres of land, or an entire half section, instead of 99 and 80-100 acres of land, the amount included in his patent from the government of the United States. Counsel for plaintiff in error in his brief claims that the patent under which plaintiff claims title conveys his fractional lots, according to the official plat of the survey of the said land returned to the General Land office by the surveyor

general. The description of the land embraced in the patent under which plaintiff claims title was as follows: "Lots No. 2 and 3 of Section 30, in Township 97 of Range 34 in the district of land subject to sale at Sioux City, Iowa, containing 99 acres and 80-100 of an acre, according to the official plat of the survey of the said land returned to the general land office by the surveyor general." The patent also discloses that it was issued to John A. Anthony, under the homestead law; it being within the railroad limits, Anthony could only enter 80 acres of land under the homestead law and must therefore pay the government price for the excess over 80 acres of land. Had Anthony been attempting to enter under the homestead law one-half of the land his grantee now seeks to obtain title to by virtue of Anthony's homestead entry, no patent would ever have issued because he legally could only enter 80 acres of land and he could legally pay excess on less than the smallest subdivision or upon less than 40 acres of land. In other words, he would not have been permitted under the law to enter 120 acres of land within the railroad limits. What significance does the words "Containing 99 acres and 80-100 of an acre according to the original plat of the survey of said land" have? Simply to determine the amount of land that should be paid for under the entry of Anthony, a statement which appears in every patent issued by the government. The plaintiff in error claims to own the 99 and 80-100 acres embraced in his patent, claims it under a statute of the United States by virtue of a patent and survey. His claim is conceded. The decision of the Supreme Court of the state of Iowa recognizes it. He also claims 220 and 20-100 acres more land than is described in his patent. He claims this 220 and 20-100 acres of land as a riparian owner. It is well established by the decisions of this court that the legal question as to whether one is entitled to land as a ripar-

ian owner or has a riparian right depends upon the law of the state wherein the claim is asserted. The principle is so well established as to need no citations. The law of the state of Iowa holds that a man owning land on a water course owns the land to the high water mark, but the Supreme Court of Iowa was unable to pass upon the question of riparian rights in this case and to apply the law of the state of Iowa to it, either under the theory of accretions, relictions or land laying between the meander line and the water course for the reason that they found as a matter of fact, there was no water course, there was no lake, but lying out and beyond the meander line of the lots of the plaintiff in error was other lands, some of it dry lands, and embraced in the homestead entry of the defendant in error, Ryan, some of it wet lands which had been patented to the state of Iowa as swamp and overflowed lands. This finding of the Supreme Court of Iowa precludes the possibility of the construction of any federal statute under the records of this case. In this connection we call attention to the decision of this court in the case of

Dower vs. Richards, 151 U. S. 658.

The case last cited was an action involving the validity of a town site patent issued under the laws of the United States pertaining to town sites as against the validity of a claim asserted under the mining laws of the United States. The decision of the Supreme Court of the state of California was in favor of the town site patent. A writ of error brought the case to the Supreme Court of the United States. The proposition of law upon which the plaintiff in error asked relief was, *when a quartz ledge is known to be gold bearing and to have been profitably worked prior to the acquisition of a town site patent, it is accepted and excluded from such patent.* The Supreme Court of the state of California did not deny this proposition of law,

but found as a fact that the quartz ledge was not known of at the time of the issuance of the town site patent and therefore the town site patent included the land there in controversy. This court in its decision said "from the foregoing reasons and authorities it follows that this court cannot review the decision of the state court upon the question of fact whether the ledge at the time when the town site patent took effect was known to be valuable for mining purposes."

Again in the language of Justice Story this court has said: "We have no authority as an appellate court upon a writ of error to revise the evidence in the court below in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it."

In the case of *Dower vs. Richards* above cited, numerous decisions are referred to which decisions we believe fairly and clearly establish the rule that the only consideration the Supreme Court of the United States will give to the finding of facts of a state supreme court is where such a court, after having determined the facts, then applies those facts and the rights accruing under such facts to a federal question. In other words where such a court applying the facts as found gives a legal interpretation to rights under the constitution or laws of the United States, then a federal question has been raised, but where as in the case at bar the state Supreme Court finds and determines a fact which precludes an application of any federel question, that the Supreme Court of the United States is without jurisdiction to inquire into such decision. We quote from the decision of the Supreme Court of the United States in the case of *Dower vs. Richards*:

"Such a writ of error can be sustained only when the decision of the state court is against a right claimed under the Constitution and laws of the United States." *Montgomery vs.*

Hernandez, 25 U. S. 12 Wheat. 129 (6:575); *Missouri vs. Andriano*, 138 U. S. 496 (34:1012.)

"And if the decision of the state court rests on an independent ground of law, not involving any Federal question, this court has no jurisdiction." *New Orleans Water Works Co. vs. Louisiana Sugar Ref. Co.* 125 U. S. 18 (31:607); *Eustis vs. Bolles*, 150 U. S. 361 (37:1111); *California Powder Works vs. Davis, ante*, P. 206. "The reasons against its jurisdiction are as strong, if not stronger, when the decision of the state court proceeds upon matter of fact only.

"When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice Catron: 'The powers of the Supreme Court are limited in cases coming up from the state courts, under the 25th section of the Judiciary Act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where their construction is drawn in question, or an authoritty exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an Act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed in a similar manner as if a like question had arisen in a Su-

preme Court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction." *Mackay vs Dillon*, 45 U. S. 4 How. 421, 447 (11:1038, 1050).

151 U. S. 308.

"In *California Powder Works vs. Davis*, ante, P. 206, in which each party to a suit to quiet title claimed title under a patent from the United States confirming a Mexican grant, and the judgment of the supreme court of California rested on the proposition of fact that the grant under which the plaintiff in error deraived titlé was simulated and fraudulent, this court dismissed the writ of error for want of jurisdiction.

"The case now before us is an action of ejectment, which was submitted to the supreme court of the same state, according to the local practice upon findings of fact and a statement of evidence by an inferior court of the state. From the foregoing reasons and authorities, it follows that this court cannot review the decision of the state court upon the question of fact whether the ledge, at the time when the town site patent took effect, was known to be valuable for mining purpose; and the only question of Federal law in the case having been rightly decided by that court, its judgment is affirmed."

It would thus seem that when the Supreme Court of Iowa has decided that upon the evidence in this case there was no body of water upon which to base the meander lines as run by the government surveyor that that fact precludes any possible claim or contention of the application of a federal question.

Counsel for plaintiff in error cites the case of *French Glenn Live Stock Company vs. Springer*, being a case considered by the Supreme Court of the United States upon writ of error to the Supreme Court of the state of Oregon as conclusive of his proposition that a federal question is shown by the records in

the case at bar. An examination of this authority discloses the fact that the question of jurisdiction was not raised in that case except as suggested by Mr. Justice Shiras in the opinion, which suggestion was as follows:

"As the case went off in the Oregon Courts on this question of fact it may be questionable whether any matter of federal law is left open for our revision."

There is one important distinction between the Oregon case and the case at bar. In the Oregon case there was no question but what there was a lake lying out and beyond the meander line, the only question being its relative position to the lots bordering upon the meander line. The plaintiff in error was contending that under these facts a proper construction of the plats and patent under which it obtained title would give it the land in controversy. While in the case at bar the Supreme Court of Iowa has determined that there was in fact no lake of water upon which to base the meander lines bordering on plaintiff's lot; that lying out and beyond this meander line was nothing but land, some dry land and some swamp land; consequently no possible construction of a federal question was made by the Supreme Court of Iowa. We do not deem that the other authorities cited by counsel require comment.

Respectfully submitted,

E. B. EVANS,

Attorney for Defendants in Error.

H. C. EVANS,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

THE PLEADINGS.

This is a suit in equity brought by the plaintiff below, plaintiff in error here. In his petition he claims that he—

"Is the absolute owner in fee simple of lots 2 and 3 in section 30, township 97, range 34; that the said lots were surveyed by the Government and platted and the record of said survey and plats were duly returned to the General Land Office at Washington, D. C.; that said lots were meandered by the Government surveyor, and said meander lines run with reference to a lake then existing in part upon said section and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation be-

tween said meander line and the lake; that subsequent to the filing of said survey the United States sold said land and issued patent thereto to John A. Anthony; that the Government had platted and sold said lots without any reservation between the meander line and the lake; that the plaintiff's title includes all of the land embodied in the south half of said section, and his title is complete to all of said land claimed adversely by the defendants."

The plaintiff prays:

"That in the event the court should determine the plaintiff is not the owner of all the land included in the south half of said section that the court then determine the extent of the boundary of the plaintiff's land and that the court decree that the plaintiff is the fee-simple owner of all the land between the meander line and the bank and edge of the lake as meandered, as well as the land between the meander line of section 30, and that title be quieted in the plaintiff."

To the plaintiff's petition the defendant Ryan answered as follows:

"This defendant denies each and every allegation in plaintiff's petition not hereinafter specifically admitted; as to whether the Government issued patents to lots 2 and 3, and the plaintiff is the owner of said land the defendant asks the court to require strict proof; as to whether said lots were surveyed and platted by the Government and said survey and plats filed in the General Land Office and as to whether said lots were meandered defendant has not sufficient knowledge to form a belief, and denies the same; the defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30, township 97, range 34. Defendant states that lots 2 and 3 of said section contain 99.80 acres, as shown by the Government survey and plats of said lots; that the patent from the United States and the warranty deeds as set forth in plaintiff's petition in describing said land only purported to convey the number of acres in each lot as shown by the Government survey and plats, and that neither said patent nor deeds purport in any manner to convey the land embraced in lots 12 and 13, being a part of the land in controversy,

and defendant denies that said patent or deeds conveyed any title whatever to the land embraced in lots 12 and 13. Defendant states that on the 8th day of March, 1898, the Secretary of the Interior directed the Commissioner of the General Land Office to cause to be surveyed certain unsurveyed land in sections 19–20–29 and 30, township 97, range 34, and sections 25, 36, township 97, range 35—that said survey was made—that there were surveyed 1,230 acres of land in the aforesaid sections; that the plat of said survey and the subdivisions of said 1,230 acres of land, together with field-notes, were duly made by said surveyor and filed in the General Land Office at Washington, D. C., in accordance with law; the land so surveyed became subject to disposal under the laws of the United States—under the direction of the Secretary of the Interior the register of the United States land office at Des Moines, Iowa, published notice as required by law that said 1,230 acres of land would be open to entry on the 30th day of August, 1898; that prior to the 30th day of August, 1898, defendant had established his residence upon lots 12 and 13 of said section, and on the 30th day of August, 1898, he filed his written application to enter the land embraced in said lots as a homestead—paid the required fees and commission to the receiver of said land office; his entry was allowed and became of record, and that said entry is now of record and in full force and effect, and the defendant is now engaged in living upon, cultivating and improving the land embraced in his homestead entry, being a part of the land plaintiff seeks in his petition to have title decreed in plaintiff—the defendant states that this court has no jurisdiction over the subject-matter of this suit; that is over lots 12 and 13 of said section for the reason that the legal title to the land embraced in said lots is in the Government of the United States, subject to the rights of this defendant to finish and complete his residence and cultivation of said lots, as required by the law."

The defendant Ryan further answering said:

"Defendant states that on the 30th day of August, 1898, the plaintiff, George Schlosser, recognizing the validity of the survey made in the year 1898, as herein set forth, filed

application to enter lots 13 and 14 of said section, being a part of the land in controversy, as an adjoining farm homestead; that his application was rejected by the register and receiver, notice of which was served on the plaintiff; that thereupon said Schlosser filed in said land office a contest against the homestead entry of this defendant; that a trial was had before the register and receiver upon the contest brought by the plaintiff, the plaintiff and this defendant appearing thereto; the register and receiver rendered their decision in favor of this defendant; within the time allowed for appeal the plaintiff, George Schlosser, appealed from said decision; that upon said appeal the said case is now pending before the Commissioner of the General Land Office at Washington, D. C.; that no decision thereon has been had. Certified copy of docket entry of said case is hereto attached marked Exhibit 'G,' and made a part hereof. Wherefore, the defendant prays that the court will require plaintiff to reply to the allegation of this defendant's answer as set forth in Exhibits A to G, inclusive, and that upon the admission of the plaintiff of the truth of said facts or upon the proof of the allegations contained in said exhibits the court will dismiss the plaintiff's bill for want of jurisdiction, and that the plaintiff's petition may be dismissed with costs against the plaintiff and for general relief."

The defendants Palo Alto County and W. L. Hemphill file the following joint answer:

"(As to lots 2 and 3, and the Government survey mentioned in plaintiff's petition; as to survey made under authority of the decision of the Secretary of the Interior of March 8, 1898, mentioned in the answer of Richard T. Ryan, the answer of these defendants is identical with that of Richard T. Ryan.) For further answer these defendants state that lots 11, 14 and 15 of section 30, T. 97, R. 34, as shown by the Government survey made from the 2d to the 20th day of April, inclusive, for the year 1898, is swamp and overflowed lands and was included in the grant of September 28, 1850, to the State of Iowa, made by the Government of the United States wherein all the swamp and overflowed land in the State of Iowa was granted to the State of Iowa and said lots were included in the grant of the legislature of the State

of Iowa wherein all swamp and overflowed land in Palo Alto county was granted to Palo Alto county. And that the defendant, W. L. Hemphill, has purchased from said county said lots, and has paid a part of the purchase price therefor; that the legal title to said lots remains in the United States as patent has not yet issued; that the equitable title is in Palo Alto county subject to a contract of sale of defendant, Hemphill; that on the 30th day of August, 1898, said county by its duly authorized swamp-land agent selected said lots as swamp and overflowed land and filed such selection in the United States land office at Des Moines, Iowa; that on the same day the plaintiff herein made application to enter said lot 14 as an adjoining farm homestead, his said application being filed in the United States land office at Des Moines, Iowa; that by order of the register and receiver of said land office a trial was had before said officers, of which the plaintiff herein had notice; that said officers rendered their joint decision, holding each of said lots to be swamp and overflowed land and approving the same to the State of Iowa and Palo Alto county; that said decision was forwarded to the Commissioner of the General Land Office on appeal of the plaintiff herein; that the Commissioner of the General Land Office affirmed the decision of the register and receiver; that thereafter the Secretary of the Interior affirmed the decision of the Commissioner and has approved each of said lots for patent; that there only remains the ministerial act of preparing and executing the patent from the Government of the United States to the State of Iowa, and from the State of Iowa to Palo Alto county to establish the legal title in said county. These defendants deny that this court has jurisdiction over the subject-matter of this suit. Wherefore, the defendants pray that the petition of the plaintiff be dismissed and judgment rendered against the plaintiff for costs and for general relief."

For the answers in full see Record, pages 2–7 and pages 9 and 10; also page 98.

DECISION.

The trial court having found in favor of the plaintiff, quieting title in him, the case was appealed to the supreme court of the State of Iowa; and on the third day of June, 1902, that court rendered its decision reversing the trial court in part, as follows:

"Lots 2 and 3 which plaintiff admittedly owns, are bounded on the south by the south section line and they extend almost across said section from east to west. Plaintiff's claim was once before presented to this court in an action of a similar nature to this, but against a different defendant. See Schlosser *vs.* Cruickshank, 96 Iowa, 414. Plaintiff was then successful. But that was before the resurvey and issuance of a patent and the making of conveyance by the county—it is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, the adjoining owner will usually take title to the actual shore line. And it may doubtless be properly conceded that no subsequent resurvey by the Government in the absence of fraud or error so gross as to be in the nature of a fraud in the original survey, could affect his title thereto.

"Mitchell & Smale, 140 U. S., 819.

"But where there is no adjacent body of water proper to be meandered the rule we have mentioned will not apply. In such a case the meander line will be a boundary line, and one who purchases from the Government according thereto cannot claim title beyond it. Grant *vs.* Hemphill, 92 Iowa, 218; French-Glen L. S. Co. *vs.* Springer, 22 S. C. Rep., 563.

"We have then to determine whether there was a body of water in section 30, proper to be meandered. As to what bodies of water should be meandered see Lester's Land Laws (ed. 1860), 714. We do not intend setting out the testimony on this point. It is quite voluminous and very conflicting. From a careful reading of it we reach the con-

clusion there was no such body of water. That there was swampy and low land in section 30 north of plaintiff's lots admits of no question, and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there. The lake spoken of in Schlosser *vs.* Cruickshank, as being about two miles wide, three miles long and 10 to 18 feet deep and adjacent to this land is evidently Lost Island lake, which lies south of section 30 and nowhere touches it. The meandered lake which gives rise to this controversy is called Mud lake and, as must be manifest from what we have said, lies north of plaintiff's land. How far, if at all, this mistake affected the conclusion in the Cruickshank case, we are not able to say, but that it was an error is clear from the fact that neither witnesses or counsel for plaintiff claim Mud lake to answer at all to the description so given. The confusion seems to have arisen from the fact that the Cruickshank case was submitted in connection with another case involving similar questions—Caldwell *vs.* Jackson—but which related to land bordering upon Lost Island lake, and the arguments were made in the latter case. If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and an existing permanent lake proper to have been meandered, we might perhaps reach a conclusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was is far south of the half section line according to all the testimony. Beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake.

"Rood & Wallace, 109 Iowa, 51.

"Noyes *vs.* Board of Supervisors, etc., 104 *id.*, 174.

"Plaintiff's present claim and the facts and arguments in its support tend to clear the half section in question of any lake, and, indeed, to remove such permanent body of water wholly from the map. We are further inclined to believe that when the meander line deviates so far from the true shore as it does in this case, from the bank of the body of water attempted to be bounded according to all the evidence,

and the concessions of counsel, the error would be so gross as to warrant a re-survey.

"Cragin *vs.* Powell, 128 U. S., 691.
"Mich. L. L. Co. *vs.* Rust, 168 *id.*, 589.
"Niles & Cedar Point Club, 175 *id.*, 300.

"While it is true the significant question before us is the condition that existed when the original survey was made, and that attempts to show this must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters, yet it appears beyond question here that the meander line was not correctly run in the first instance, and we think it is satisfactorily disclosed that no body of water necessary to be meandered then existed where Mud lake is shown on the plat to be." "Reversed."

Schlosser *vs.* Hemphill (case at bar).

STATEMENT OF FACTS.

The Government patent under which plaintiff claims title conveyed lots numbered 2 and 3 of section 30, township 97, range 34, and the plat and field-notes of the survey under which said patent was issued, as well as the patent, all recite the fact that the land disposed of by the patent was "ninety-nine acres and eighty-hundredths of an acre (excess paid as per receiver's receipt No. 2213)."

All of the deeds of conveyance from the original patentee to the plaintiff recite the number of acres conveyed to be ninety-nine acres and eighty-hundredths of an acre, the same as the patent from the Government did. The land was entered by the original patentee under the homestead law. Being within railroad limits, the entryman could not enter, under the homestead law, to exceed eighty acres, but could, by paying the Government price of $2.50 an acre for the excess, receive a patent for a fractional subdivision of less than forty acres in addition to the eighty he could enter.

There is no dispute in the case but what the plaintiff has

title to lots 2 and 3, containing ninety-nine and eighty one-hundredths acres.

WAS A MISTAKE MADE IN THE ORIGINAL GOVERNMENT SURVEY IN THE RUNNING OF THE MEANDER LINES ALONG THE NORTH SIDE OF PLAINTIFF'S LOTS NOS. 2 AND 3.

Plaintiff's Exhibit F, on page 11 of Record, shows the meandering lines of the original Government survey of what is known as Lost Island lake. It discloses that, according to the original meander line, Lost Island lake embraced substantially all of section 31, the section south of the land in controversy, all of section 30 save a small lot, No. 1, and lots 2 and 3, now owned by plaintiff, a large portion of section 29, a portion of section 20, and the major portion of section 19. According to the original meander lines, the lake was more than five miles in length.

Defendants' Exhibit 2, page 73 of Record, is the plat made by a second survey of the land, which survey was made in 1898, when all of the land originally meandered as being a part of Lost Island lake and situated in sections 30, 29, 20, and 19 was surveyed, platted, and disposed of. The number of acres thus surveyed and platted was 1,230 acres. As to the authentication of this survey and plat, see Exhibits 2, 24, 25, 26, 27, and 28, found on pages 73 to 77, inclusive, of Record.

Defendants' Exhibit 21, found on page 44 of Record, is a plat or survey made by J. T. Painter, which plat accompanied the application for survey upon which the Secretary of the Interior based his action in ordering the survey of 1898. On page 41 of Record counsel for plaintiff below (in order to save time) conceded that Mr. Painter would testify to the levels as taken and shown by his figures on plat, Exhibit 21, and that the plat should be taken as his full testimony as to such levels. Upon an examination of plat, Exhibit 21, we find, from the numerous levels taken on the

land originally meandered as a part of Lost Island lake, the land to be from 1.28 feet to 49 feet above the level of the waters of the slough or inlet to Trumbull lake, which slough or inlet is situated on section 30, and is the so-called lake plaintiff in error bases his riparian ownership claims upon.

Defendants' Exhibit 4, page 39 of Record, and the testimony of Mr. Moore on page 35 of Record, show a number of levels taken by Mr. Moore on the south half of section 30, being the land here in controversy, with reference to the waters of Lost Island lake. Mr. Moore's No. 1 on Exhibit 4 commences at the water's level of Lost Island lake. He then takes 26 levels, 24 of which are taken on the land in controversy, 26 on the banks of Lost Island lake, and 27 is again the level of Lost Island lake. These levels show that the land in controversy is from 1 to 24 feet above the waters of Lost Island lake.

Upon these facts as to the condition of the land being presented to the Secretary of the Interior, that officer, on the 8th day of March, 1898, directed the Commissioner of the General Land Office to make an examination of the land.

The Secretary's decision was in part as follows:

"By your office letter dated January 26th, 1898, you transmitted for departmental consideration application for survey of certain lands situated in sections 19, 20, 29, and 30, township 97, range 34. The application appears to have been served upon the owners for the lots bordering upon the lake. The applicants allege that meandering lines of said lake are wholly wrong; that the line established as a meandering line through sections 19 and 30, was from sixteen to forty-nine feet above high-water mark of said lake. That the meandering line on sections 20 and 29 is from thirteen to twenty-nine feet above high-water mark of the lake. That from the configuration of said land, there is not now, and was not at the time of the official survey, any reason or facts that could possibly be construed as justifying the meandering lines as established. From the official plat of said township it appears that the lake extends into four townships, viz: townships 96 and 97, ranges 34 and

35, is about five and a half miles long, and from a half a mile to a mile and a half in width. The case of Grant *vs.* Hemphill, 92 Iowa, 218, is cited in brief of the counsel for the plaintiffs; which involves the greater part of section 19; wherein it was held by the supreme court of Iowa that the land 'is not now, and probably never was any part of a lake.' In Noyes *vs.* Collins, 92 Iowa, 566, the supreme court of Iowa held that the title of riparian owners does not extend beyond the natural shore. In view of the showing made and the decisions of the supreme court, it is deemed proper to institute an inquiry into the facts. You are, therefore, directed to send a special agent to the locality to make special examination into the land in question, the position of the lake, past and present, and submit his report, when made, to the Department."

The Commissioner of the General Land Office, in obedience to instructions above quoted, detailed A. W. Barber, special clerk and surveyor of the Land Department, to make the examination which resulted in the second survey, as shown by plat, Plaintiff's Exhibit 2, page 73 of Record, and field-notes accompanying said plat, shown by Exhibit 31, page 80 of Record.

Upon the filing of the plat and field-notes made by Barber with the Commissioner of the General Land Office that officer transmitted the same to the Secretary of the Interior, and on the 25th day of June, 1898, said plat and field-notes were approved by the Secretary of the Interior, as shown by Defendants' Exhibit 26, which is in part as follows:

"March 8th, 1898, you were directed to send a special agent to the locality in question to make examination relative to the Government survey of land in the State of Iowa, situated in sections 19, 20, 29 and 30, township 97, range 34. On the request of your office, the Department, March 17th, 1898, detailed Amherst W. Barber to make the examination and survey. In your letter of June 13th, 1898, you transmit the report of Mr. Barber, dated April 2nd, 1898. Mr. Barber states that he has arrived at the conclusion that the land in sections 19, 20, 29 and 30, township 97, range 34, and a portion of the land in sections 25 and 36, township 97, range

35, were erroneously returned by the deputy surveyor in 1855, as covered by lakes. That there is no reasonable doubt that the pretended meandering of the lake was improper and almost wholly fictitious; and that the land should be surveyed and disposed of as public land. With his report Mr. Barber submitted a plat showing that the land in question is mostly agricultural in character, with a wet, marshy pond, called Mud lake, covering portions of sections 25 and 30, with an outlet going west into Trumbull lake. He also shows that there is a body of deep water in sections 31 and 32, township 97, range 34, separated from the land to the north by a sand ridge twelve feet high. From his report, it appears that there has been surveyed by him 1,230 acres additional, 533.71 acres as swamp land, the remainder farming land. I see no reason why the survey executed by Barber should not be approved, and the land disposed of as Government land."

See Transcript of Record, pages 74, 75.

It will thus be seen that the second survey was executed under the direction of the Secretary of the Interior upon notice to all alleged riparian owners upon a full investigation made by the Interior Department, and that all the land in controversy herein was found by the Interior Department to be land and not lake. It was found by that Department that the original survey of the township wherein the land in controversy is situated and the meandering of Lost Island lake was entirely erroneous; that the meander lines as run in said original survey on sections 30, 29, 20, and 19 were run without reference to any bodies of water.

The supreme court of the State of Iowa, upon the trial of this case and upon the consideration of a vast amount of testimony which we do not at this time set out, found as a matter of fact that there was no lake upon which to base the meander lines run on section 30 along the north side of the plaintiff's lots 2 and 3 nor upon sections 29, 20, and 19; that all of the land embraced within said meander lines was in fact land and not lake.

ASSIGNMENT OF ERRORS.

The plaintiff in error has assigned in his written brief eighteen errors. As shown by the record, there were but ten errors assigned when the writ of error was first sued out in the supreme court of the State of Iowa (pages 130–131, Record). However, all of the errors assigned by the plaintiff may be summed up as follows:

That under the laws and statutes and decisions of the United States a meander line is not a boundary line of lots sold by the United States, but is run for the purpose of conforming to the irregularities and sinuosities of creeks and lakes for the purpose of ascertaining the amount of land for which the Government charged on the sale thereof; that the supreme court of Iowa erred in holding that at the time of the original Government survey there was no lake adjacent to plaintiff's land proper to be meandered, and that the meander line was incorrectly run.

POINTS OF LAW.

The plaintiff in error claims title to the south half of section 30 under and by virtue of his patent to lots 2 and 3, conveying 99.80 acres, his contention being that as riparian owner he is entitled to the entire south half of section 30. In other words, that by reason of a patent issued under the homestead law, wherein he could only enter eighty acres of land, he obtained title to 320 acres. He bases this claim upon the fact that the original survey shows that a lake lay north of the meandered lines of plaintiff's lots.

The defendants claim that a mistake was made in the original survey made by the Government; that there was not at the time of the original survey any body of water lying north of section 31, in township 97, range 34, upon which to base the meandered line run along the north of plaintiff's lots 2 and 3, in section 30, and that the original survey erroneously

omitted from the surveyed lands 1,230 acres, of which all the land in controvery is a part.

The court below found, as a matter of fact, that there was no lake on section 30, 29, 20, or 19 on which to base the meander lines run through said section, but that all the land embraced within the meander lines run by the Government surveyor was land and not a lake.

THE NEW SURVEY.

1. Has the Secretary of the Interior authority to inquire into the facts for the purpose of determining whether a mistake was made in a Government survey?

2. If the Secretary of the Interior has the power to inquire into the facts, has he the authority to determine the question of whether a mistake was made; and if he has such authority, has he the authority to correct such mistake and to resurvey lands improperly omitted from the original survey?

3. If the Secretary of the Interior has authority to inquire into the facts and determine whether a mistake has been made in a survey, and has the authority to correct such mistake if he finds one has been made, and has the authority to resurvey lands improperly omitted by the first survey, what effect does his action in determining that a mistake did exist and in correcting the mistake and in surveying the land omitted by the original survey have upon the question of jurisdiction of the courts?

The defendants in error contend that the findings of the Land Department are unassailable in a collateral proceeding when, as in the case at bar, the Land Department has acted upon an application properly presented, assailing the correctness of the survey already made. We claim that the second inquiry in this case was a judicial inquiry

made upon notice served upon the plaintiff in error, and after a full investigation of all the facts in the case, and that the Secretary of the Interior, under such circumstances, having found that the original survey was a mistake and omitted 1,230 acres of land from the public domain and caused a new survey to be made, his findings and decisions are conclusive as to all questions involved in this case.

The decisions of this court upon this question are very persuasive as to the position of the defendants in error. We call attention to the language of this court in the case of Creegan *vs.* Powell:

"The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint. The correction of these mistakes has not been delegated to the judiciary. From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office under the supervision of the Secretary of the Interior. The Commissioner is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularities and fraud in their operations. Under the authority of specific appropriations by Congress, for that purpose, the resurvey of public lands has become an extensive branch of the business of the General Land Office. * * * That the power to make and correct surveys of the public lands belongs to the political department of the Government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases like that of other special tribunals upon matters within their jurisdiction, are unassailable by the courts, except by direct proceeding; and that the latter, have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

Cragin *vs.* Powell, 128 U. S., 691 (L. C. P., 32, 566).

How and by whom is the question of what lies beyond the meander line of plaintiff in error's lots to be determined?

The defendants in error say that the Secretary of the In-

terior is a special judicial tribunal created for the purpose of determining such questions. In discussing the question of the jurisdiction of the Secretary of the Interior, this court has said:

"This jurisdiction extends to the ordering of new surveys whenever, in the judgment of the Department, there has been error or fraud in the survey already made."
Michigan L. L. Co. *vs.* Rust, 168 U. S., 589.

Again, this court has declared:

"If the Department was not satisfied with this survey, there was no rule of law standing in its way from ordering another."
New Orleans *vs.* Payne, 147 U. S., 361.

Another case in point is the case of Niles *vs.* The Cedar Point Club, where the controversy was between two claimants of land occupying the relative positions of the plaintiff and defendants in error in this case; one claiming title under a patent from the United States issued under a second survey, occupying the position of the defendants in error in this case; the other party to the litigation claiming title to the land by virtue of it lying between the meander line of land which he had bought from the Government and the banks of a navigable body of water. The case was tried in the lower court upon the following agreed statement of facts:

"In 1834 and 1835, Ambrose Rice, a deputy surveyor, surveyed township 9, R. 9, and T. 10, R. 10, the same being the northern part of Ohio and adjacent to Lake Erie. He run a meander line some distance from the main body of Lake Erie. The description in the field-notes of the meander line being designated 'Flag marsh' and 'Impassable marsh and water.' The lots along the meander line were platted, and in 1844 the fractional lots bordering on the meander line were patented to Margeret Bailey. The appellant held title under these patents as a grantee of Margeret Bailey. The patents each recited the number of acres granted. In 1881, J. B. Marston under instructions

from the General Land Office surveyed and subdivided the land between the meander line as run by Rice and the bank of Lake Erie, being the land designated by Rice as 'Impassable marsh and water.' The field-notes of this last survey were approved by the Land Department. Thereafter the land was patented by the United States, and the title thus conveyed is now owned by the appellee. The condition of the so-called 'Impassable marsh' or water was stipulated to be as follows: Covered with a deep marsh of grass, canes or reeds, wild rice, etc., some of which are mown for a kind of coarse hay, other parts filled with bogs and pond holes and do not dry in summer, without any well-defined channel. The drainage was across the marsh and the lake. In heavy gales of wind it was subject to inundation from the lake. In discussing the question involved in this case the supreme court says:

"'It may be that Surveyor Rice erred in not extending his survey into the marsh, but his error does not enlarge the title conveyed to the surveyed fractional sections. The United States sold only the fractional sections, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for or than the Government was offering for sale. * * * Rice should have extended his survey to the shores of Lake Erie, but he did not do it. He stopped at the borders of the marsh, and the Land Department approved his action. He evidently thought the marsh was to be treated as a body of water. A conclusion not unwarranted, but a conclusion which other findings show was not correct. * * * But it is urged that the fact that a meander line was run amounts to a determination by the Land Department that the fractional sections bordered upon a body of water, and that, therefore, the purchasers of these fractional sections were entitled to the riparian rights. But there is no such magic in a meander line; all that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, Government or Indian reservation.'"

Niles vs. Cedar Point Club, 175 U. S., 299 (44, 171).

There is a long and unbroken line of decisions of this court which hold that the Secretary of the Interior has juris-

diction to determine questions pertaining to surveys and resurveys and has jurisdiction to correct mistakes in surveys, and that when he has determined these questions his finding, in the absence of fraud, is absolutely conclusive upon the courts; and fraud will never be presumed, but must be clearly plead and proven. The officers of the Government are presumed to have done their full duty, and this presumption applies in all its force. Wrongful action on the part of the land officers is never presumed. There must be clear proof in support of these contentions.

Johnson *vs.* Townsley, 31 Wal., 72 (80 U. S., 20, 485).
Warner *vs.* Van Brunt, 19 Wal., 646 (86 U. S., 22, 219).
Shepley *vs.* Cowan, 91 U. S., 330 (23, 424).
Moore *vs.* Robbins, 86 U. S., 530 (24, 848).
U. S. *vs.* San Jacinto Tin Co., 125 U. S., 272.
Minter *vs.* Crommelin, 18 How. (U. S.), 87.
Colorado Coal Co. *vs.* U. S., 123 U. S., 307.
U. S. *vs.* Marshall Silver Mine Co., 129, 579.
U. S. *vs.* San Jacinto Tin Co., 125 U. S., 273.
Stringer *vs.* Young, 3 Pet. (U. S.), 320.
Patterson *vs.* Jenke, 2 Pet. (U. S.), 216.

Granting that a court of equity may set aside a patent issued by the Government in cases of fraud and mistake, such action can only be had when the pleadings in the case contain clear, specific averments of fraud, which averments must be supported by clear, satisfactory proof. Every case written on this subject holds that the fraud or mistake must be plead, and must clearly and distinctly be established by satisfactory proof.

U. S. *vs.* Maxwell Land Grant Co., 121 U. S., 325; 122 U. S., 365.
Colorado Coal Co. *vs.* U. S., 123 U. S., 307.
U. S. *vs.* Atherton, 102 U. S., 372.
Vance *vs.* Burbond, 101 U. S., 514.
U. S. *vs.* Hancock, 133 U. S., 193.

And in this connection it is well to note that it is only when fraud, imposition and perjury have prevented a party from fully prosecuting his case, or the land officers from fully considering it, that a court of equity will re-examine it and pass upon the questions of fact decided by the Land Department. It must appear that such fraud affected, entered into and controlled the determination of the Land Department. In the case at bar the Land Department has acted. It has said there was a mistake in the original Government survey. It has corrected that mistake, surveyed 1,230 acres of land omitted from the survey of the public domain by reason of that mistake, and there is not in this case one line of pleading or one scintilla of evidence that the plaintiff in error has not had full, fair and complete opportunity to present his claims to the Land Department. The record discloses that he did so present his claims, and that the decisions of that department were against him.

See Exhibits 29, 30, 32, and 33, pages 77 and 78 of the Record.

That the original Government survey which meandered the lakes known as Lost Island lake, Round lake, and Trumbull lake, situated in the township in which the land in controversy is located and the two adjoining townships, was a fraud, and omitted some 3,000 acres of land from such surveys by placing them within the meander lines of said lakes, is so well established by the decisions of the Interior Department and the supreme court of the State of Iowa as to admit of no controversy. The mistake was judicially declared to exist in the case of Grant *vs.* Hemphill, which went up from Palo Alto county to the supreme court of the State on a suit brought by riparian owners against Hemphill and others, the supreme court of the State of Iowa held that the land in controvery in that case being part of the land resurveyed with the land here involved "was a part of the unsurveyed public domain to which no

one could obtain title except through the regular channels adopted by the Government of the United States for the disposition of public lands."

Grant *vs.* Hemphill, 92 Iowa, 218.
Hemphill Case, 26 Land Decision, 319.
Hemphill Case, 27 Land Decision, 119.
McClennan Case, 29 Land Decision, 514.
Chapman Case. (See Dec. Feb. 28, 1900, not reported.)
McClennan Case, 30 Land Decision, 527.
Schlosser *vs.* Hemphill, — Iowa, — (case at bar).

The decisions of the Secretary of the Interior, just cited, were not *ex parte*, but were rendered upon a full investigation of the alleged mistake and fraud in the original survey. This being true, his decisions on the questions of fact are conclusive and, upon questions of law, entitled to great weight.

The decision of the Secretary, so far as the land in controversy is concerned, is found on pages 74 to 76, inclusive, of Record (Def'ts' Ex. 25 and 26). We here set out the decision of the Secretary ordering a survey of the 900 acres of land omitted from the original survey on the south of Lost Island lake. The records of this case and the General Land Office disclose that Lost Island lake is situated almost wholly upon section 31 of T. 97, R. 34. The original survey, however, placed with the meander lines of the lake 1,230 acres of land lying north of the lake, in sections 30, 29, 20, and 19 of T. 97, R. 34; also some 900 acres of land lying southwest of the lake, in sections 1, 2, 11, 12, 13, and 14, T. 96, R. 34. The following quotations are taken from the decision of the Secretary of the Interior involving the last described land:

Secretary Hitchcock to the Commissioner of the General Land Office, February 17, 1900. (W.V. D.) (W.C.P.)

"John McClennen and Moses L. Pruitt and Clay County, Iowa, have presented applications for the survey of certain lands in said county, amounting to about eight hundred acres, which it is alleged have never been surveyed and are represented by the Government survey of lands in that vicinity and by the plats made therefrom as a lake. Protests against these applications were presented by adjacent owners and the matter was submitted to the department by your office letter of April 7, 1899, for instructions in the premises.

"The township in which it is alleged this unsurveyed land is, being T. 96 N., R. 35 W., Iowa, was surveyed in 1855 and 1856, and that survey and the map made from the field notes thereof represented parts of sections 1, 2, 11, 12, 13 and 14, as a lake. A meander line was run, indicating the extent of the alleged body of water, and the tracts rendered fractional thereby have all been disposed of by the United States. This meander line starts from a point near the half-mile corner on the east line of section 1, runs thence in a southwesterly direction to a point in section 13 near the half-mile corner on the line between sections 13 and 14, thence northwest to a point just west of the half-mile corner on the line between sections 11 and 14, and thence in a northeasterly direction to a point just east of the half-mile corner on the north line of section 1.

"The petitioners here have filed a map purporting to show the lake as it now actually is. According to this map the meander line starts at the same point as does the meander line shown upon the map of the Government survey. It runs thence in a southwesterly direction to a point somewhat less than a quarter of mile almost due south of the center of section 1; thence in a northerly direction to a point just north of the center of section 1; and thence in a northeasterly direction to the point on the north line of section 1 where the meander line shown by the Government survey ended. The starting points and the stopping points are the same in both cases.

"The applicants, McClennen and Pruitt, allege

"'that there never was a lake of water in said sections [1, 2, 11, 12, 13 and 14] and that the meander lines as set out by the Government survey, and as shown by the Government plats, is an absolute mistake, and that there is not now and never has been any lake or body of water on said sections of land upon which to base said meander lines;'

"that there is a lake in the adjoining township which borders on the N. E. ¼ of section 1, of the lands in question; that the configuration of the shores of said lake has not materially changed since the Government survey; that the meander lines of said survey are so surely wrong as to leave no doubt that a fraud was perpetrated in the making of said survey; that much of the land is high, dry and tillable land that would not have passed to the State as swamp land had it been properly surveyed; that McClennen has been residing upon and cultivating about one hundred and sixty acres of said unsurveyed land for fourteen years, and that Pruitt has been residing upon and cultivating about one hundred and twenty acres thereof for six years.

"With the papers is an affidavit of J. T. Painter, who says he made a survey of these lands and prepared the map filed as 'Exhibit 1.' He explains the map and certain photographs filed as exhibits and says:

"'I further depose and say that about two hundred acres of the land between the meander lines of the original survey, as shown on plat Ex. 1 is high hilly land; that a large portion of the balance of the said unsurveyed land would be termed as gentle rolling prairie land and that the remainder of said unsurveyed land would be of a swampy character.

"'I further depose and say that the meander lines as made by the Government surveyor, as shown in red ink on plat Ex. 1, are absolutely erroneous; that there never was a body of water upon which to base said meander line; that they are run over the tops of hills and along the sides of hills and it is my opinion that they were run on paper only and never were actually chained or surveyed.

"A joint affidavit of McClennen and Pruitt sets forth that the former is residing upon and cultivating a portion of the high dry land in sections 2, 11 and 12, and that Pruitt is residing upon and cultivating unsurveyed land in section 1, and concludes as follows:

"'We further depose and say that all the land resided upon and cultivated can be cultivated to crops in any season; that the same is very hilly and that it is impossible that the same was ever covered by the water from Lost Island lake, or that it was ever in a lake at all, and that its present condition is the same as it was when the original survey was made.'

"There are filed the affidavits of ten parties who claim to have known the land in question for from five to twenty-five years, each of whom says he has read the affidavits of Painter and McClennen and Pruitt and from his personal knowledge of the character of the lands knows the statements made therein are true.

"*With the petition are affidavits of five other persons, who say that they were acquainted with the surveyors who made the surveys of this township and other Government lands in Clay and Palo Alto counties, and that while making these surveys the men were frequently under the influence of liquor, and wholly unfit to properly perform that work.*

"Owners of adjacent lands were notified of the filing of these petitions and some of them have filed protests against the survey of the land in question as requested. None of these protests denies the statement that there is a large body of land within the meander lines as fixed by the Government survey of said township, nor alleges that said lines correctly, or approximately so, indicated any body of water as it existed at the time of said survey. They claim, as grantees of the tracts made fractional by said meander lines, the adjoining unsurveyed land.

"The question is as to the authority to survey these lands as Government lands, if the facts are as stated by the petitioners, and, hence, for the present these statements that the survey was erroneous and that a large portion of the space indicated thereby as water was in fact land that should have been surveyed, will be taken as true.

"The petitioners rely upon the decision of the supreme court of Iowa in the case of Grant *v.* Hemphill (92 Iowa, 218), in support of their contention, while the protestants refer to the decision of the same court in Schlosser *v.* Cruikshank (96 Iowa, 414), in support of their claims. These cases both involved land in the immediate neighborhood of that here in question. In Grant *v.* Hemphill it was found that there was no body of water anywhere on the land upon

which to base the meander line. The court recognized the rule that meander lines are run, in surveying the public lands, not as boundaries but for the purpose of defining the sinuosities of the body of water and as a means of determining the quantity of land in a tract made fractional by reason of bordering upon such body of water, but held that the rule did not apply in that case because there was no body of water to which the meander line could be referred.

* * * * * * *

"Has this Department, after the tracts designated by the survey as fractional because of bordering upon a body of water, have been disposed of, authority to examine as to the correctness of such survey and, if such examination demonstrates that there was no body of water to prevent the extension of the township, section or subdivisional lines and, that therefore the survey was incorrectly made, either through mistake or fraud, is there any authority to cause the lands omitted from such survey to be surveyed and disposed of as public lands?

"The authority to cause a survey to be made under such circumstances has not been denied by this Department, but the decisions so far as they go, tend to assert it. In the case of Archie G. Palmer (26 L. D., 24), application was made for the survey of an island in the Platte river, alleged to have been in existence at the date of the survey of public lands upon the bank of the river but not shown upon the plat of such survey, and the Department said:

"'But if it is a fact that there was in existence, at the date of the survey, an island in the locality described, above high-water mark and not subject to overflow and fit for agricultural purposes, containing about one hundred and twenty-five acres of land—more than three legal subdivisions—which was omitted from the survey of 1862, it may be that the island was omitted from the original survey through fraud or mistake, so that a survey should now be granted.'

"A hearing was ordered to ascertain the facts and upon consideration of the evidence adduced the application for survey was denied, it being held that there was nothing to indicate fraud or mistake. Archie G. Palmer (27 L. D., 380).

"In the case of W. L. Hemphill *et al.* (26 L. D., 319), the allegations made in support of the petition for a survey were

very similar to those made here and it was ordered that an inquiry be instituted to ascertain the facts. An employé of your office was detailed to make an investigation, who reported that the lands were erroneously returned as covered by a lake and that there was no reasonable doubt that the pretended meandering of a lake was improper and almost wholly fictitious. He made a survey of the lands and with his report submitted a plat based upon that survey. This Department concurred in the recommendation of your office that such survey should be approved and the land disposed of as Government lands (27 L. D., 119).

"In John J. Serry *et al.* (27 L. D., 330), the application for a survey of lands between the meander line and the actual water line was refused. In that decision it was said:

"'These lots were bought from the Government upon the faith of the statement that they had a water front and have for many years been bought and sold among individuals under the same conditions. If there be any power in this Department under such circumstances to disregard the former survey and make a new one that power would be exercised only in exceptional cases where the utmost disregard of rules and regulations and flagrant mistakes in the execution of the former survey were disclosed. No such condition is exhibited here. The land alleged to have been left between the meander line and the water was not of great extent and was of little value either present or prospective at the date of that survey.'

"The question presented here does not seem to have been directly involved in any decision of the Supreme Court of the United States, and hence no specific ruling therein is to be found.

"In Cragin *v.* Powell (128 U. S., 691), the court laid down several propositions which have a bearing upon the question now under consideration. It was said:

"'It is a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned as if such descriptive features were written out upon the face of the deed or the grant itself.'

"As to the power of this Department over the survey of the public lands, it was said:

"'The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of the Government. The correction of these mistakes and abuses has not been delegated to the judiciary except as provided by the act of June 14, 1860, 12 Stat., 33, c. 128, in relation to Mexican land claims, which was repealed in 1864, 13 Stat., 332, c. 194 sect. 8. From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office under the supervision of the Secretary of the Interior. Rev. Stat. 453. The Commissioner, in the exercise of his superintendence over surveyors general, and of all subordinate officers of his bureau is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularity and fraud in their operations. * * * That the power to make and correct surveys of the public lands belongs to the political department of the Government and that, whilst the lands are subject to the supervision of the General Land Office, the decision of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. * * *

"'It is conceded that this power of supervision and correction by the Commissioner of the General Land Office is subject to necessary and decided limitation. Nor is it denied that when the Land Department has once made and approved a governmental survey of public lands, (the plats all having been filed in the proper office,) and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased, in good faith, from the Government against the interferences or appropriations of corrective resurveys made by that Department subsequently to such disposition or sale.'

"In Hardin *v.* Jordan (140 U. S., 371), it was held that the rights of an owner of land bordering upon a body of water are to be determined by the law of the State in which they lie, that meander lines are run to mark the sinuosities of the water which forms the boundary and that the purchaser from the United States of a tract shown by the survey to

border on a body of water takes to the water's edge or to the center of the body of water, according to the law of the State. That case involved a narrow tongue of land which was not surveyed or shown upon the plat and as to this the court said (page 399):

"'As to the narrow tongue of land which, according to the finding of facts, projects into the lake from the north side, we do not think that it can have any effect upon the decision of this case. It does not appear to have extended far enough southerly, at least during high water, to be opposed to the property of the plaintiff. Besides, the plat of the lake and the land surrounding it, referred to in the patent granted to Holbrook, exhibits the various fractional sections surrounding the lake as immediately bordering upon it; and this, as shown by the authorities already cited, constitutes the lake itself the real boundary of the land, without regard to the meander line. There should be some extraordinary proof of mistake on the part of the surveyor in order to interfere with the passing of the land as riparian land.'

"This would seem to be a recognition of the fact that there might be a case where, because of mistake, lands adjacent to the fractional tract would not pass even though there was a body of water to which the survey lines might be referred.

"In Mitchell *v.* Smale (140 U. S., 406), the court reaffirmed the ruling in Jordan *v.* Hardin as to the effect of a patent around the margins of a lake, and that the water and not the meander line is the boundary but added the following:

"'We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of an obvious fraud; in which case the Government would have the right to recall the survey, and have it corrected by the courts or in some other way. Cases have happended in which, by mistake, the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government.'

"In Horne *v.* Smith (159 U. S., 40), the official plat of survey showed sections 23 and 26 as fractional because of bordering on Indian river a meander line being run to mark such river. As a matter of fact the survey stopped short of the river the water meandered being that of a bayou instead of the river. The court held that there was simply an omis-

sion to make any survey of land between the bayou and the river, saying:

"'Although it was unsurveyed it does not follow that the patent for the surveyed tract adjoining carries with it the land which perhaps ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it.'

"In this connection the court cited the case of Lammers v. Nissen (4 Neb., 245), as somewhat in point saying:

"'In that case it appeared that between the meander line as run and the Missouri river was a tract of several hundred acres, and the court held that as that body of land had not been surveyed it did not pass by a patent of a lot which on the Government plat extended to the meander line.'

"An examination of the decision in Lammers *v.* Nissen discloses that only a part of the meander line involved there was along a slough.

"If a mistake of a surveyor in establishing a meander line along a slough instead of upon the body of water called for by the survey may be corrected it would seem that a mistake in laying down such a line, where there was no body of water to base it on may also be corrected. If the Government is not bound in the one case there certainly is no good reason for holding it bound in the other. The theory upon which the courts and this Department have refused to interfere where there is a small body of land left between the meander line and the actual water line, is because it may be properly presumed that the purchaser took the land to secure the water front pertaining thereto and it would be an injustice to deprive him of that water front which is often the most valuable part of his purchase. This reason has, however, no applicability where there was in fact no water upon which to base a right. One purchasing a tract under such circumstances, might claim that he was misled by the representations made by the plat of survey but he could not claim that any right was taken from him if a survey should be made, after his purchase, of the land left unsurveyed, because of the mistake in the survey under which he bought. The reason for the rule having disappeared the rule itself has no force in such a case.

"If the allegations made in this case are true, the lines of

sections 2, 11, 12, 13 and 14 would not have intersected any body of water had they been extended to their full length. The persons who have acquired the fractional tracts in those sections would not, by a survey of the lands omitted from the former survey, be deprived of any benefits arising from a water front and ought not to be heard to complain that they would be deprived of land which they never paid for. They will still hold the full quantity of land which they bought. The same would be true as to a part of the subdivisional lines of section one, but it is impossible to determine now, the points at which such subdivisional lines would, if properly extended, intersect the body of water.

"It is not necessary to search for the source of the error. The result is the same whether such error arose from mistake, inadvertence, incompetency or fraud on the part of the men who made the former survey. A careful examination of the law, the precedents, furnished by the decisions of the courts and this Department, and the rights of both the Government and its grantees, leads irresistibly to the conclusion that this Department has authority, even after the tracts designated by Government survey as fractional by reason of bordering upon a body of water have been disposed of, to examine as to the correctness of such survey, and if that examination demonstrates that there was no body of water to prevent the extension of the township, section or subdivision lines to cause the lands thus erroneously omitted from survey to be surveyed and disposed of as public lands of the United States.

"The facts presented in support of this petition for survey, and not disputed, clearly indicate that a serious mistake was made in the survey of this township, and a new survey should now be made. Upon an inspection of the land that mistake and the serious inaccuracy in the Government survey were so obvious that no one could have been misled by the latter."

* * * * * * *

John McClennen case, 29 L. D., 514.

The report of the survey, together with the plat and field-notes made under directions of the decision of the Secretary just quoted, was before the Department for approval March

11, 1901. We quote from the decision of the Secretary approving the survey:

Secretary Hitchcock to the Commissioner of the General Land Office, March 11, 1901.
(W. V. D.) (E. F. B.)

"With your letter of January 15, 1901, you transmitted to the Department the papers pertaining to and including returns of survey of parts of sections 1, 2, 11, 12, 13 and 14, in township 96 N., R. 35 W., Iowa, executed by M. P. McCoy, examiner of surveys, in pursuance of directions contained in the decision of the Department of February 17, 1900 (29 L. D., 514), upon the application of John McClennen *et al.* Also the returns of survey of part of section 3, in township 96 N., R. 35 W., and parts of sections 22, 23, 26, 27, 34 and 35, in township 97 N., R. 35 W., Iowa, executed by the said M. P. McCoy under instructions issued upon the application of J. C. Chapman *et al.*, pursuant to directions contained in the letter of the Department of February 28, 1900 (unreported).

"You state that in compliance with instructions contained in said decision of February 17, 1900, the local officers retained in their office for thirty days copies of the unapproved plats of survey, giving notice to all parties in interest that said plats were there for the purpose of inspection, in order that they may have an opportunity to file any objections they might have to the approval of said surveys, and that at the expiration of thirty days the local officers reported that no objections to the approval of said plats of survey had been filed after due service of notice.

* * * * * * *

"The plat of survey of the lands in township 96 N., R. 35 W., covers parts of sections 1, 2, 11, 12, 13 and 14. On the plat of the original survey of 1856 said lands are represented as being covered by a body of water known as Lost Island lake. The returns of the survey under consideration show that the original meander lines do not approximate the true meander of the lake but traverse high, rolling prairie, from five to twenty feet above the level of the swamp, except near the outlet of the lake, where the swamp extends as much as half a mile outside the said original meanders, and the character of the land, as shown by said returns, indicates that there has been no material change in the lake since such

original survey. Thus the conclusion reached that this original survey was erroneous in that it did not include all the public lands in said townships subject to survey is sustained. You report that no objections have been filed against the approval of the survey of the lands in this township bordering on Lost Island lake and that said survey has been executed in strict accordance with the instructions.

"The only objections to the approval of the plat of survey of the lands in townships 96 and 97, R. 35 W., bordering on Round and Trumbull lakes, reported with your letter, is contained in a petition filed by W. W. Cornwall, swamp-land agent of the county of Clay, and J. C. Chapman, who request that the lines of survey be extended over said alleged bodies of water for the reason that the land embraced within the meander lines shown by the plat of survey is swamp and overflowed land which passed to the State of Iowa under the swamp-land grant.

"No objection to the survey is made by any one claiming as a riparian proprietor. The protestants, although they are owners of lands bordering on the meander line, do not claim under such right, but, on the contrary, deny that there are any riparian rights in the owners of lands bordering on the meander line of lakes or ponds in Iowa. They deny that there is a permanent body of water that prevents the extension of the lines of survey, and, hence, they protest against the meanderings of Round and Trumbull lakes, as such, when in fact as they allege the meander line is upon a body of swamp and overflowed land that was acquired by the State under the swamp-land grant, which inured to the county of Clay by virtue of the act of the legislature of Iowa, approved January 13, 1853, granting all the swamp and overflowed lands acquired under said grant to the counties, respectively, in which such lands are situated.

"With reference to this and similar claims, the governor of the State of Iowa has addressed a letter to this Department, under date of January 30, 1901, in which he says:

"'I am advised that a number of parties are seeking to have re-surveys made of portions of the area of this State that were originally meandered as lakes. I write to say that this State lays claim to all meandered lakebeds, and in behalf of the State I desire to make formal objection to any re-survey of these lands, unless requested by the governor of the State or some person duly appointed and authorized

to act. This does not apply to any particular tract, but to all portions of the State originally meandered.'

"By letter of February 26, 1901, he objects to the approval of these particular surveys upon the ground that the original surveys were correctly made and the bodies of water which were meandered at the time were in fact lakes and the shores of the same were correctly meandered by the original township survey; that upon the approval of said survey the title to the beds of the lakes, as meandered by said survey, vested in the State of Iowa by virtue of its sovereignty, and the United States has no authority to divest the State of its title to such lake beds by any resurvey thereof; that the grant by the State of Iowa to the several counties in said State, of the swamp and overflowed lands acquired by the State under the swamp-land grant, did not include any part of the beds of lakes to which the State claims title in its sovereign right and which can not be affected by any resurvey of said lands in the interest of the United States or of the several counties, or of any individual who may claim any title to or interest in said lake beds; and that if it is sought to establish the claim that an error was made in the meandering of these lakes by the original township survey, either upon the part of the United States, the counties in which such lakes are situated, or an individual, such attempt raises an issue of fact which can only be determined upon a hearing by the proper tribunal on sufficient notice, and the Department of the Interior is not the proper forum.

"The State does not dispute the title of the county to the swamp and overflowed lands that properly come within the grant of September 28, 1850, but it claims to be the owner of the lake beds in said State, not as grantee of the United States, but by virtue of its sovereignty. Nor does the United States dispute the title of the State to the beds of the lakes and streams in said State that were properly meandered by an approved township survey, or claim any authority to make a resurvey of lands that may have been formed since the survey by the recession or drying up of the waters of such lakes or streams. But the United States does not, by the approval of a survey, part with its title to lands that were erroneously omitted from survey. Such lands are Government lands. The power to make and correct surveys of the public lands belongs exclusively to the political de-

partment of the Government (Cragin *v.* Powell, 128 U. S., 691). The Secretary of the Interior, being charged with the supervision of the public lands, is the proper tribunal to determine whether the land in question was a part of the lake bed or was public land omitted from the survey (Knight *v.* Land Association, 142 U. S., 161; Rood *v.* Wallace, 79 N. W. Rep., 449). No affidavits have been filed in support of the allegation that the lakes were properly meandered by the original survey, and no reason is shown why the decision of the Department, of February 17, 1900, in the case of John McClennen, directing that the lands omitted from the former surveys be surveyed, should be disturbed.

"No question of law is presented by the petition of Chapman and Clay county which does, as held by you, constitute an objection to the approval of this survey in its present form. There is simply a question of fact as to whether Round and Trumbull lakes, as shown by the present survey, are bodies of water of such permanent nature as are required by the manual of instructions to be meandered. If they are, the surveys should be approved."

* * * * * * *

"No sufficient objections to the approval of said surveys having been filed, and it appearing that they have been executed in accordance with the instructions, you will approve the same, to the end that the lands may be disposed ofas public lands."

John McLennen Case, L. D., vol. 30, 527.

COMPETENCY OF ORAL TESTIMONY.

The plaintiff in error in this case attacks the homestead entry of Richard Ryan for lots 12 and 13. Ryan's entry at the time of the commencement of this action was of record in the United States land office, and the only thing lacking to complete his title was his compliance with the land law, and thereafter, the issuance of patent. The plaintiff also attacks the patents issued by the Government of the United States under the swamp-land grant and by the State of Iowa to Palo Alto county, and the conveyance from Palo Alto county to the defendant Hemphill, which patents and con-

veyance embrace lots 11, 14, and 15, which, together with lots 12 and 13, embrace all the land in controversy.

The plaintiff in error has sought to impeach the defendants' title under these conveyances from the United States by parol testimony. We submit that oral testimony is not competent to thus impeach the defendants' muniments of title in a collateral proceeding.

In support of this position we call attention to the decision of this court in the case of Knight *vs.* United States Land Association; and for a more complete understanding of the question involved in that case we quote from the decision at some length, showing the offer of oral testimony for the purpose of impeaching a patent issued under a second survey, which brings the case at bar clearly within the realm of this decision.

"Plaintiff offered in evidence the first survey made by Deputy Surveyor Stratton approved by the surveyor general of California, confirmed by the Commissioner of the General Land Office and also produced a witness who testified the premises were below the ordinary high water mark.

"Objected to because the survey had been cancelled and superseded by another survey in accordance with the instructions of the Secretary of the Interior.

"The defendant offered in evidence patent from the United States, also a plat of lands surveyed by Van Leicht under instructions of the United States surveyor general approved by the Commissioner of the General Land Office indorsed as follows:

"The field notes of the survey are strictly in accordance with the instructions of the Commissioner of November 27, 1883. W. H. H. Brown, surveyor general.

"Objected to because the first survey is the final adjudication of the land office of the location of the premises and the patent is void to the extent that it departs from the first survey.

"The court found the facts to be that the premises were below the high-water mark and were below and outside of the first survey made by Stratton, approved in 1868, but were within a subsequent survey approved in 1884, and

upon the finding of facts held that the last survey was illegal because in approving the prior survey the Commissioner of the General Land Office was acting in judicial capacity and his judgment is not reversible. The plaintiff claims the Stratton survey was correct and was never legally set aside, that the latter survey upon which defendant's patent issued was wholly unauthorized in law and was void."

The foregoing sufficiently states the facts in that case and it is seen that the case was almost exactly like the case at bar so far as the actions of the Land Department of the Government are concerned. After stating the facts the Supreme Court of the United States said :

"It is a well-settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government and that the action of that department within the scope of its authority is unassailable in the courts except by direct proceeding. Under this rule it must be held that the action of the Land Department in determining that the Von Leicht survey correctly delineated the boundaries of the Pueblo grant, is binding in this court, if the Department had jurisdiction and power to order that survey."

After a very lengthy and exhaustive discussion of the duties and power of the Secretary of the Interior over surveys the Supreme Court uses these words:

"The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands. * * * We conclude that the Secretary of the Interior had ample power to set aside the Stratton survey and order a new survey by Von Leich and that his action in such matters is unassailable in the courts in a collateral proceeding. The Von Leich survey, therefore, must be held as a correct survey."

As to the question of the admission of parole evidence to show the land was below the ordinary high-water mark the court says:

"We think there was error in admitting evidence to show that the land was below high-water mark of the creek. The judgment should have been for the defendant. Knight *vs.* United States Land Association, 142 U. S., 116" (L. C. P. 35, 974).

By reason of the plaintiff in error's patent for ninety-nine and eighty one-hundredths of an acre he seeks to obtain title to 320 acres. In the case of Horn *vs.* Smith, Mr. Justice Brewer delivered the opinion of the court, and in the opinion we find the following language:

"The contention of the plaintiff is that inasmuch as this body of land is not shown upon the official plat, and although the boundaries and areas of the three lots are given, the latter aggregating only 170 acres, the patent for the lots conveys all the land to the main body of the river. In other words, a patent for 170 acres contains over 700. The basis of this contention is the familiar rule that a meander line is not a line of boundary, and that a patent for a tract of land bordering on a river conveys the land not simply to the meander line, but to the water line."

In this decision this court upheld an instruction which practically told the jury that where there was so much land lying beyond the meander line the familiar rule that a meander line is not a line of boundary did not apply.

Horn *vs.* Smith, 159 U. S., 40.

The question in the case of French Glen Livestock Company *vs.* Springer was as to whether, at the time of the survey and the establishing of a meander line, there was a lake upon which to base a meander line, being substantially the question we have in this case. It was urged that the fact that a meander line was run amounts to a determination by the Land Department that the surveyed

fractional sections bordered on a body of water. It was sought to have this court follow the rule announced in the case of Hardin *vs.* Jordan, 140 U. S., 384. But this court did not feel called upon to enter into that discussion, for the supreme court of Oregon reached its conclusions apart from any such question, holding that there never was a lake in front of plaintiff's lots, and that these issues of fact were clear and distinct, and, having been submitted and decided by the court below on the question of fact, this court affirmed the decision of the supreme court of Oregon.

French Glen Livestock Company *vs.* Springer, 185 U. S., 47.

In the case of The Security Land and Exploration Company *vs.* Burns the action was ejectment, commenced in the district court of St. Louis county, in the State of Minnesota, to recover certain lands in that county. The doctrine announced by this court was substantially that when the plat of a Government survey is the result of and founded upon a fraud, and when there is actually no lake near the spot indicated by the meandered lines, and where the result of holding to the general rule that meandered lines are not boundary lines, would be that the adjacent owner's title would be extended to embrace fourfold more land than he entered, the false meander line should be considered as a boundary line of the adjacent owner's land and not the bank of the body of water lying beyond. The court said :

" We think French Glen Livestock Company *vs.* Springer, 185 U. S., 47, is authority which calls for the affirmance of this judgment. In that case the plaintiff claimed under patents from the United States which referred to the official plats of the survey, and by which it appeared the township was rendered fractional by abutting upon the meander line along the south side of Malheur lake, which plat appeared to have been approved by the Land Department of the Government, and the plat showed the lots as bounded north by

the meander line of Malheur lake. The field-note of the survey of the exterior boundaries of the township and its subdivisions, and the meander line of Malheur lake itself, under the title headings 'Meanderings of the south shore of Malheur lake through fractional township 26' indicated that it was run with the meander of the lake. The plaintiff in that case claimed title to land which was just north of this meander line, on the ground that such land was a portion of the lake when the survey was made and the meander line run around it—the defendant disputed this claim, and asserted that when this survey was made and the plat thereof with its meander line was referred to in the patent, there was in fact no such lake anywhere near the spot, and the so-called meander line was in truth a line bounding plaintiff's land and limiting him thereby so that he could not go beyond it in order to find the lake which plaintiff claimed as a boundary."

In the case of The French Glen Livestock Company *vs.* Springer there was a lake in fact which would have been touched by the lines of the adjacent's owner's lots had those lines been extended to the banks of the lake. But as the lines thus extended would only have touched the lake at one place, and because it would have the effect of giving the adjacent owner title to three times as much land as he bought from the Government, this court held that the meander line in that case was a boundary line determining the amount of land the adjacent owner had purchased from the Government.

Counsel for plaintiff in error quotes decisions of the Iowa supreme court at some length in order to suggest to this court that the question of the title to the beds of lakes in Iowa has not yet been determined by the decisions of the supreme court of that State in so far as riparian owners are concerned, and therefore the common-law rule will apply, whereby, as is claimed, the riparian proprietor will take to the center of the lake. The decisions of the supreme court of the State of Iowa are perfectly clear on this proposition.

The decisions cited by counsel for plaintiff in error establish this question. But the doctrine contended for has no place in this case, because the supreme court of Iowa and the Secretary of the Interior have both determined that there was no lake upon which to base the meander lines. If there was no lake, there is no lake bed.

Dry lake was a meandered body of water seven miles long and about one mile in width, with a depth of three to seven feet. It was artificially drained and its bed surveyed by the county and sold, the deeds reciting the fact that the land was sold under the swamp-land grant. A suit was brought by a land-owner owning fractional pieces of land along the meandered line of Dry lake, claiming that as a riparian owner he owned the bed of the lake adjacent to his fractional lots. The suit was brought against the grantee of the county under the swamp-land grant. The supreme court of Iowa said:

"The rule that the title of riparian owners upon a natural lake or pond does not extend beyound the natural shore appears to be very generally, almost universally, recognized. Our views are in accord with this doctrine."

Noyes *vs.* Collins, 96 Iowa, 567.

In another case, involving exactly the same questions on the same lake, the supreme court of Iowa said:

"The rule that a riparian owner of land bordering on rivers or streams, in the absence of limitation in his title, takes to the center thread of the stream, does not apply in this State to the case of a lake or a pond."

Noyes *vs.* The Board of Supervisors, 104 Iowa, 175.

Again, on this same question, the supreme court of Iowa, in a case involving the title to 800 acres of land embraced within the meander lines of what is known as Owl lake, said:

"We are quite ready to assume, as a general proposition, that title to all the lake beds in the State, especially those

of navigable lakes, is in the State, and that the General Government never had any control or ownership thereof—but when, how, and by whom is the question of whether the land is a lake bed is to be determined—there seems to be no doubt that the Secretary of the Interior had the right, in so far as the parties to this suit are concerned, to determine the question as to whether or not the land in question was a part of the lake bed, or was covered by the so-called swamp-land act—what force is to be given to the determination of the Land Commissioner that the land was in fact swamp land, and what effect is to be given to the patent issued to the State?—but when there is a fair dispute as to the character of the land when originally surveyed, surely the Land Department has the right to determine the dispute, and as a general rule its decision is binding until set aside by direct attack."

Rood *vs.* Wallace, 109 Iowa, 8.

Another case is that of Carr *vs.* Moore, involving the title to the bed of what is known as Iowa lake. The evidence in that case disclosed that Iowa lake was meandered in 1849, when the Government survey of the township wherein it was situated was made; that the plaintiff Carr owned two lots platted by the surveyor as bordering on this meandered lake. The plaintiffs asked that the whole bed of the lake be decreed as owned in common by the adjoining proprietors in proportion to the extent of their assumed shore line, or that by lines running from the intersection of their boundaries with such assumed shore line to some point which may be found to be the center of the lake, portions of the lake bed to be set off to them in severalty. The defendant claimed title under the swamp-land grant. The supreme court of Iowa found that, while the lake was from three to six feet deep at the time of the original survey, there was no lake, in the proper sense of the word, upon which to base the meander line, and denied the plaintiffs' title to the bed of the lake as a riparian owner.

We now call attention to a recent statute passed by the legislature of the State of Iowa, in which the State assumes

to own the title to the beds of all meandered lakes within the State (chapter —, Acts 30th G. A. Iowa).

"SECTION 1. Survey and Sale Authorized.—The executive council of the State is hereby authorized and empowered to survey the meandered lakes and lake beds within this State, and sell the same as hereinafter provided, and to determine what lakes shall be maintained as the property of the State and what meandered lake beds belonging to the State may be drained, improved, demised or sold.

"SEC. 2. Signed Statements—Survey—Report.—Upon the presentation to the executive council of the statement signed by not less than fifty (50) freeholders, twenty of whom shall be actual residents of the township or townships in which said lake or lake beds are situated, or any county that any meandered lake or lake bed in such county is detrimental to the public health or the general welfare of the citizens of the county, and that it is unwise to maintain such meander lake or lake bed as a permanent body of water, and that the interest of the State will be subserved by draining and improving such lake bed, the governor shall, within thirty (30) days after the receipt of such statement, appoint a competent engineer who shall at once examine the situation and condition of such lake or lake bed, make a survey and plat thereof, and ascertain whether its location is such that it can be drained and improved, and make a full report to the executive council of the area and depth of water in the lake and of its general physical condition, which report shall be accompanied by his plat, field notes, and profile of his survey."

"SEC. 3. Hearing—Commissioner—Notice.—Upon receipt of the report of the engineer, the executive council shall determine whether such lake or lake bed shall be maintained and preserved as the property of the State, or whether the same shall be drained, improved and the land included within the meander lines thereof sold in the manner hereinafter described."

FEDERAL QUESTION.

Is there a Federal question involved in this case?

The only question contended for by the plaintiff in error is that the supreme court of Iowa limited the title of the land

his grantor obtained under his patent from the United States to ninety-nine and eighty one-hundredths acres, the amount of land described in said patent.

There were three decisions the supreme court of Iowa could have rendered:

First. That the plaintiffs' land on the north was bounded by the meander line.

Second. That the plaintiffs' land on the north was bounded by the shore line of the lake.

Third. That the plaintiffs' lots on the north were bounded by the half section of line.

There was no dispute in the pleadings or evidence as to the title to the 99.80 acres. The dispute was one of boundary. It was a question where the north line of plaintiffs' lots was located—a question purely of boundary; and there is no question in this case involving in the slightest degree the acts of Congress or the laws of the United States under which plaintiff's grantor obtained his title to lots 2 and 3. In this connection we call attention to the language of a decision of this court, as it so aptly and conclusively expresses the crucial point involved in the plaintiff in error's contention:

"This court has repeatedly held that it does not warrant the review of an adjudication upon a mere question of boundary. The fact that the land to which the boundary relates is held by a title derived from an act of Congress does not change the result. If the title be admitted, as recognized by the act, its location upon the boundary is a subject wholly within the cognizance of the State tribunals, and it is not within the power of this court to review their action.

"The supreme court of Louisiana construed correctly the several acts of Congress. The errors, if any were committed, were in locating it upon the land, and in fixing the boundary. No act of Congress was drawn in question."

Lanfear *vs.* Hinley, 4 Wall., 209.

If a Federal question is presented in the record of this case, then every cause involving the title to real property where the litigants derive title under and by virtue of a law of the United States and wherein their right to the land was denied by a State supreme court could be reviewed by the Supreme Court of the United States regardless of the questions decided by the supreme court. As we understand it, the rule is that it is only where the statute under which the party received his title from the Government of the United States must be construed and passed upon that the Federal question is raised, not in a cause such as the one at bar, where no question is made or no construction is necessary of the act under which the plaintiff in error obtained his title, the only question being the extent of the boundaries of that title. We again quote from a decision of this court:

"It is a mere question of boundaries between two neighbors. * * * It is a question of fact depending on monuments to be found on the ground, documents in the Land Office or the opinion of expert surveys; * * * if the accident of the controversy that both parties claimed title under the United States should be considered as sufficient to bring it within our jurisdiction then every controversy involving the title of such lands, whether it involves inheritance, partition, devise or sale may with equal propriety be the subject of examination by this court."

Moreland *vs.* Page, 20 Howard, 523.

The jurisdiction of this court to consider this case involves the following questions:

First. Is there a Federal question involved and has the decision of the Federal question, if any is involved, been against the validity of a treaty or statute or an authority exercised under the United States? Has the decision been in favor of the validity of a statute of or an authority exercised under the laws of the State of Iowa, which statute or authority is repugnant to the Constitution, treaties, or laws of the

United States, or has the decision been against any title, right, privilege, or immunity specially set up or claimed by plaintiff in error under the Constitution or any treaty or statute of or commission held or authority exercised under the United States? If the answer to these questions is in the negative, such answer ends this case.

Second. Could the case have been decided by the supreme court of Iowa without regard to the Federal question? If the answer to this question is in the affirmative, it likewise ends this case.

"Whenever the power to enact a statute, as it is by its terms, or is made to read by construction, is fairly open to denial and denied the validity of such statute is drawn in question but not otherwise."

Baltimore and Potomac R. R. Co., 130 U. S., 224.

"The validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted nor is the validity of an authority every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence or constitutionality or legality of such statute or authority is denied and the denial forms the subject of inquiry."

United States *vs.* Lynch, 137 U. S., 285.

See also Cook County *vs.* Calumet and Chicago Land Company, 138 U. S., 653.

The question of the validity of the statute under which the plaintiff in error claims his title is not in question in this case. It is only a question of fact as to the boundaries of the land the plaintiff in error secured under that statute; that question of fact could be and was determined by the supreme court of Iowa without regard to the Federal question. We now call attention to the decision of this court in the case of Sweringen *vs.* City of St. Louis, 185 U. S., 45, which case is very similar as to facts and legal questions as is the case at bar. In that case

the plaintiff in error, being the plaintiff below, obtained a judgment in the State circuit court of the city of St. Louis for the recovery of certain lands. Upon appeal the supreme court of the State of Missouri reversed the judgment of the circuit court and the plaintiff in error brought the case to this court by writ of error. The property was bounded on the east by the Mississippi river, the question involved in the case was whether plaintiff was entitled to the alluvium caused by the recision of the Mississippi river by virtue of a patent from the United States. The trial court held she was; the supreme court held she was not. In the patent of the United States conveying the land in controversy to plaintiff's grantor, the boundary lines of the land granted were described. It appeared in evidence that at the time patent was executed that the east boundary of the land described in the patent was several hundred feet west of the waters of the river, that at the time of the trial such boundary was 1,500 feet west of the waters of the river. The plaintiff in error brought her suit of ejectment against the city of St. Louis; the city was using the land brought into existence by the recision of the waters of the Mississippi river as a public wharf. A motion was made in this court to dismiss the writ of error for lack of jurisdiction based upon the averment that there was no Federal question involved. In passing upon this motion the Supreme Court said:

"In our judgment there is no Federal question arising by reason of plaintiff's claim under the patent put in evidence by her as the source of her title to the land in question. With reference to the first clause of section 709 of the Revised Statutes, it appears plainly that the validity of the patent has never been questioned. Nor has the validity of any treaty or statute of, or authority exercised under the United States, been drawn in question. It is a pure question of the construction of the language used in the patent. Whether the land granted therein reached the waters of the Mississippi river on the east, or whether, according to the courses and distances con-

tained in the patent, the eastern limit of the land conveyed was some hundreds of feet west of the river. It was really a question of facts as to how far east the measurements of the courses and distances carried the boundary. There was no contention made as to the authority of the Government to convey the land to the bank of the river where the water was actually flowing, if it choose so to do."

Sweringen *vs.* St. Louis, 145 U. S., 45.

In the case at bar we have the plaintiff in error claiming title to the land in controversy under and by virtue of a patent issued under the laws of the United States pertaining to the disposal of public lands known as the homestead law. The defendant in error, Richard T. Ryan, claiming a right to secure a patent from the United States under the same law and by virtue of his settlement upon the land and the allowance of his homestead entry. The defendants in error, Palo Alto County and W. L. Hemphill, claiming a portion of the land in controversy under and by virtue of the swamp land grant of September 28, 1850, and patents issued by the United States under that grant. It is not denied but what each and every law just mentioned was valid. We are not called upon to consider for one moment the validity of either statute. We are not called upon to consider its existence or its constitutionality or to determine its import or in any manner to interpret either of these laws. The one question involved in this case is the boundary line between the land patented to Anthony the grantor of the plaintiff in error and the land patented to the State of Iowa under the swamp-land grant claimed by the defendants in error Palo Alto County and W. L. Hemphill, and the land embraced in the defendant Ryan's homestead entry.

As to the 8th and 9th assignments of error made by the plaintiff in error, we suggest that it is not competent to attack the decision of the Secretary of the Interior and the acts of his subordinate officers in relation to the survey of the

public domain in a collateral proceeding. The Secretary of the Interior is vested with wide discretionary power in reference to the determination of the character of land and of surveys of the public land. When he has decided, his decision is binding upon the courts, at least to the extent that they cannot be set aside and held for naught in a collateral attack.

Could the case have been decided by the supreme court of Iowa without regard to a Federal question? If so, this court is without jurisdiction. The answer to this question is found in the decision of the Supreme Court. We have not set out for the purpose of this motion the record of the vast array of testimony produced in the trial of this case and considered by the supreme court on the question of fact as to whether there was a body of water upon which to base the meander line of plaintiff's lots. If there was in fact no body of water north of plaintiff's lots which could properly be meandered, then there is absolutely nothing upon which to base plaintiff in error's contention of riparian ownership. Days were spent in the trial court taking testimony of witnesses as to the so-called body of water designated as Mud lake. Expert surveyors were employed on both sides of the controversy. Scores of levels were taken on the land. Lines were run, maps introduced, old settlers were brought in to testify as to the volume of water upon said land, and after considering the entire case on this question of fact and announcing the rule in Iowa as to riparian ownership, the supreme court of Iowa said:

"We have then to determine whether there was a body of water in section 30 proper to be meandered. As to what bodies of water should be meandered see Lester's Land Laws (edition 1860), 714. We do not intend setting out the testimony on this point. It is quite voluminous and very conflicting. From a careful reading of it we reach the conclusion there was no such body of water. That there was swampy and low land in section 30 north of plaintiff's lots admits of no question, and in wet

seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there."

Thus we have a question of fact as to the character of land decided by the supreme court of Iowa which is absolutely conclusive of the entire matter. Even had we attacked the law under which the plaintiff claimed his title, and it was necessary to construe that law, yet if the supreme court of Iowa could have determined the matter without regard to that question, having been raised, then our inquiry is ended, and such a determination becomes a finality; but we have no such question. The law under which plaintiff claims his title is not to be construed; it is not attacked; his rights under the law are not denied; and so for both reasons discussed herein we submit the plaintiff has no standing in this court.

In conclusion we submit that the questions involved in this case and decided by the supreme court of Iowa against this plaintiff were: First, a question of fact in which it was found that there was no body of water north of plaintiff's lots upon which to base the meander line as run by the original surveyor. Second, that the distance between the meander lines of plaintiff's lot and the water line of the alleged lake was so great and the land lying between said water line and meander line was so much that the plaintiff could not, under the laws of Iowa, be possibly construed a riparian owner. Third, that the statutes of limitations of Iowa will not run against the grantees of the Government of the United States under the the swamp-land grant before the land has been surveyed or selected. Neither of these three questions involves a Federal question or a question which confers jurisdiction upon this court

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Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 176

GEORGE SCHLOSSER, PLAINTIFF IN ERROR.

vs.

W. L. HEMPHILL, RICHARD RYAN, AND PAIO ALTO COUNTY, IOWA.

Index and Point Brief for Defendants in Error

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INDEX BRIEF.

Plaintiff below, being the plaintiff in error here, by virtue of a patent issued by the United States under the Homestead Law, to plaintiff's remote grantor now owns lots 2 and 3 of section 30, township 97, range No. 34, Iowa.

The patent and all subsequent deeds give the number of acres in lots 2 and 3 as 99.80 acres.

There is no question or dispute as to the title of the 99.80 acres embraced in lots 2 and 3, and it is in the plaintiff.

The plaintiff's lots 2 and 3 lie along the south part of the south half of section 30 (Record, page 11).

The land in controversy is over 200 acres of land situated on the south half of section 30, lying north of plaintiff's lots 2 and 3.

The plaintiff claims this land as a riparian owner, claiming the north line of his lots 2 and 3 is a meander line, run with reference to a lake existing on section 30.

The defendants in error claim that the north meander line of plaintiff's lots 2 and 3 "were not run with reference to a lake then existing in part upon section 30." (Record, page 2.)

The defendants further claim that all the land in controversy is a part of 1,230 acres of land omitted from the original government survey, and that the land was thereafter surveyed under direction of the Secretary of the Interior in the spring of 1898, and was opened to entry at the United States Land Office at Des Moines, Iowa, on the 30th day of August, 1898. (Record, pages 3 to 6, inclusive.)

The defendant, Ryan, claims lots 12 and 13 of section 30, being 101.15 acres of the land in controversy, as a homestead, entered by him on the 30th day of August, 1898, at the United States Land Office in Des Moines, Iowa. (Record, pages 3 to 5, inclusive.)

The defendants, Palo Alto County and Hemphill, claim lots 11, 14 and 15 of section 30, being all the land in controversy (except lots 12 and 13 claimed by Ryan), under a swamp land patent issued by the United States to the State of Iowa and from the State of Iowa to Palo Alto County, both of which patents were issued in 1898. (Record, page 96, Ex. 44 and 45.)

THE PLEADINGS.

Petition	Record	1-2
Answer Defendant Ryan	"	2-5
Answer Defendant Hemphill and Palo Alto Co.	"	6-7
Plaintiff's Reply	"	7
Amendment to Answer Hemphill	"	7-8

Amendment to Answer Ryan..... " 8-
Reply Plaintiff..... " 8-9
Amendment to Ans. Hemphill and Palo Alto Co. " 9-10

WAS THERE MISTAKE AND FRAUD IN THE ORIGINAL SURVEY AND WAS THE MEANDER LINES AS RUN ON SECTIONS 19-20-29 AND 30 RUN WITH REFERENCE TO A LAKE?

(Grant vs. Hemphill, 92 Iowa, 218.)

Testimony of Surveyor Moore.....Record 34-39
Testimony of Surveyor Painter ..... " 41-43
Testimony of Surveyor Painter..... " 53-56
Testimony Banfield..... " 47-52
Testimony Beatty..... " 57-58
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Decision of Secretary McClennan Case..... Brief 21 33
Decision Secretary March 8, 1898.....Record 74
Decision Secretary June 25th, 1898..... " 75
Decision Register and Receiver..... " 78-79
Decision Commissioner..... " 78
Field Notes..... " 80
Plat Exhibit ..... " 73
Patent from United States to Iowa..... " 96
Patent from Iowa to Palo Alto County..... " 96
Photographs ..... " 99-110
Decision Iowa Supreme Court..... " 125
For decision of the above question see defendants in error brief, pages..... 9-12
And decisions of Sercetary discussing the facts, pages 21 to 23 inclusive, also page ..... of this Index Brief.

The defendants now call attention to a number of assertions and statements made by counsel for plaintiff as to certain alleged facts, which statements are not born out by the records.

Plaintiff's counsel states that there was a lake to the north of plaintiff's lots, that this is conclusively proven. That the original field notes prove it and they are not contradicted.

The question of whether there was a lake north of plaintiff's lots has been judically determined in two cases by the Supreme Court of Iowa and by two decisions of the Secretary of the Interior, each decision holding there was no lake.

Grant vs. Hemphill, 92 Iowa, 218. Record page No. 3, bottom. Defendants' Brief, page 10. bottom.

Secretary's Decision, March 8, 1898. (Record 74 Ex. 25.)

Secretary's Decision June 25, 1898. (Record 75 Ex. 26.)

Schlosser vs. Hemphill. (Record 126 to 129, case at bar.)

We maintain that the decisions just cited are conclusive on this question of fact. We further claim that the evidence in this case establishes the fact that there was and is no lake lying north of plaintiff's lots. The following witnesses called by plaintiff to establish his contention that a lake in fact existed gave testimony of a persuasive character against plaintiff's claim.

JAMES SPAULDING.

Known the land since 1872, "I dont call this lake along the east side of Section 30 on map Exhibit G, it has always had grass on it ever since I have been there." (Record p. 17) His testimony relates to lots 11 and 15 of the land in controversy (See Plat P. 73 Record)

FRANCIS FITZGERALD.

"The entire bed of Mud Lake was dry seven years ago, they tried to put flax in there, but it was drowned out." (Record p. 22 top)

NICHOLAS RICE.

"The eastern portion of the half section was generally covered with water in the spring but receded toward fall. The lake went dry one or two years. The last six or seven years there has been no water on the south half of section 30 in the fall or middle of the summer. When the snow goes off and the spring rain comes there would be water there." (Record, page 20, bottom; page 24, top.)

JOHN CROOKSHANK.

"Have known Mud Lake since 1868. One summer all of Mud Lake was dried up. * * * The deepest hole in Mud Lake is in Clay County across the line, it is quite deeper than in section 30, the marsh or inlet lies up through the north half of section 30. * * * * * The east 80 of the south half of section 30 dried up more than half the time, no material difference between the east half and the rest of section 30 * * * * I think it could have been mowed and pastured in 1850 if it was a dry season. * * * * * I made affidavit for Mr. Barber, that the only lake here is Lost Island Lake, the statement is true (Record, pages 25 to 28)."

Reference to defendants' plat, Exhibit 2, page 73, of record, will disclose the fact that the "inlet" mentioned by plaintiff's witness, Crookshank, runs through the north half of section 30.

Defendants' witnesses gave testimony on the questions as to whether there was a lake north of plaintiff's lots as follows:

S. BANFILL.

Owned a farm in section 24, township 97, range 34, being the section northwest of land in controversy. "I lived there seven or eight years from 1871, bought wood of Anthony and used to go across and chop and haul wood. * * * * * There was a postoffice at Anthony's and I would go there to get my mail * * * * * Am familiar with that part of the land designated on Exhibit 2 as a marshy pond, called Mud Lake. In the fall of 1871 it was nearly dry. You could not see any water in Palo Alto

County. * * * * * Several years the marshes dried so you could go over them, that was between 1871 and 1879.

"The rise and fall of water in Trumbull Lake would not necessarily affect the water in Mud Lake; Mud Lake is higher. In the spring of the year after the snow melted the creek had water in it. In dry seasons in the summer it dried up so that cattle could not get water; the average summers the water dried up in the creek. If there was a ditch cut from Mud Lake to Trumbull Lake it would drain all the water out of Mud Lake. The distance between the two is about a half mile, and a ditch between the two would have drained Mud Lake during the years I was there. There was a large body of land up there known as the unsurveyed land." (Record, pages 47 to 51.)

J. T. PAINTER.

Q. I will ask you if at the time the township and range line was run in 1855 between 34 and 35, was it run through what is known as Mud Lake?

A. According to the field notes it was measured through; they did not offset as they did at Lost Island. (Record, page 54, bottom.)

EDWARD BEATTY.

"Live in Lost Island township, Palo Alto County, section 19. I am acquainted with Exhibit No. 2, and the land embraced in it. I have had in cultivation lot 8 of section 30, township 97, range 34. It was in 1895. I sowed it to flax about the last of May I think it was. I have known the land since 1890.

"I had my flax on lot 8 and part of lot 7; had in about 50 acres. There was no sod there. I called it the bottom of a marsh. It produced very little flax. I did not harvest it; it did not mature in the fall and the weeds took it. No water got on it. It would not have been worth cutting." (Record, pages 57 and 58.)

HIRAM DAVIS.

"I live at Milford, Dickinson County; have lived there some 36 years. Came to this country thirty-six years ago last June.

I was at lost Island and Mud lakes the next July on a hunting excursion. There was some four or five of us. We were there nearly a week. We were on the island at that time; walked over from the south side. We were camped on the isthmus between Lost Island and the lake. We took a notion to go over and explore the island, and walked over. I was shown the other day where Mr. Schlosser's house is. We camped on the premises north of Anthony's, and walked over from there to the island."

Q. What was the condition of the low land at that time?

A. We considered it a slough—a rush slough. We used to call it the Lost Island slough; grass, rushes, vegetation of different varities growing there. Old grass on the ground under the fresh grass. The sod was thick and heavy. We could drive right across it with a wagon at that time. We drove about half way from the island beyond Schlosser's house down across to the timber point with a pair of mules and a heavy wagon. Near to and east of the island and point the land was very near the same, a little more water on the north side than the other. I think there was bigger rushes and more grass.

Q. That is now called Mud Lake? What was the condition of that?

A. There was not much water on the point of it; but after we come down to where the county line is below that there appeared to be more water. There was not so much grass and rushes down there.

Q. What is the fact as to whether there was grass and rushes all over it, or not?

A. Why, we supposed that there was nothing but grass; just a slough, rat houses occasionally where there was enough water to make one or to have one. It is a very uneven piece of land—rolling; kind of mounds and sags in it.

Q. You mean that piece represented as a lake?

A. Yes, sir; up through there.

Q. What was the appearance of that place at that time as to whether there was a lake there or not?

A. We didn't consider any lake in there.

We didn't consider it a regular lake. We didn't consider that in the lake grass and rushes would grow to that extent. They were growing very nearly all over it. It was a good place for ducks and geese. We camped a little south of what has been designated as the "point." There was quite a high raise there, and we camped right on the bank of the slough. I next saw the ground about October of the same year. It was in very nearly the same condition then; perhaps a little wetter, or perhaps a little drier. I could not recollect; we had so many bad places and sloughs them days to contend with. I was teaming, moving trappers, drawing freight from Ft. Dodge, Webster City and Des Moines. (Record, pages 68 and 69.)

See also on this point Barber Plat, record page 73, and field notes, record pages 80 and 81. Also Secretary's Decision, record pages 74 and 75.

Counsel states: "That there was a lake to the north of the lots at the time of the government surveys in 1855 and 1857, and that it remains there today is conclusively shown. (See decision Commissioner appendix, page 5, for full description of lake.)"

The Commissioners' Decision cited was made in 1894, was not appealed from, has since been repudiated by the defendant. (See Secretary's Decision, record pages 74 and 75.)

THE NEW SURVEY.

1. Has the Secretary of the Interior authority to inquire into the facts for the purpose of determining whether a mistake was made in a government survey?

2. If the Secretary of the Interior has the power to inquire into the facts, has he the authority to determine the question of

whether a mistake was made; and if he has such authority, has he authority to correct such mistake and to resurvey lands improperly omitted from the original survey?

3. If the Secretary of the Interior has authority to inquire into the facts and determine whether a mistake has been made in a survey, and has the authority to correct such mistakes if he finds one has been made, and has the authority to resurvey lands improperly omitted by the first survey, what effect does his action in determining that a mistake did exist and in correcting the mistake and in surveying the land omitted by the original survey have upon the question of jurisdiction of the courts.

The above questions are discussed in defendants' brief, pages 14 to 41, inclusive.

The decisions of this court fully and completely answer the first two of above questions in the affirmative, and in every case where the Secretary had determined (as a fact) that there was in the original survey a mistake and has corrected that mistake by a new survey, his actions have been upheld by this court.

Cragin vs. Powell, 128 U. S., 691 (L. C. P., 32, 566).
Michigan L. L. Co. vs. Rust, 168 U. S., 589.
New Orleans vs. Payne, 147 U. S., 361.
Niles vs. Cedar Point Club, 175 U. S., 299 (44, 171).
Shepley vs. Cowan, 91 U. S., 330 (23, 424).
Moore vs. Robbins, 86 U. S., 530 (24, 848).
U .S. vs. San Jacinto Tin Co. 125 U. S., 272.
Minter vs. Crommelin, 18 How. (U. S.), 87.
Colorado Coal Co. v. U. S., 123 U. S., 307.
U. S. vs. San Jacinto Tin Co., 125 U. S., 273.
Stringer vs. Young, 3 Pet. (U. S.), 273.
U. S. vs. Marshall Silver Mine Co., 129-579.
Patterson vs. Jenke, 2 Pet. (U S.), 216.
U. S. vs. Maxwell Land Grant Co., 121 U. S., 325; 122 U. S., 365.
Colorado Coal Co. vs. U. S., 123 U. S., 307.

U. S. vs. Atherton, 102 U. S., 372.
Vance vs. Burbond, 101 U. S., 514.
U. S. vs. Hancock, 133 U. S., 193.

The defendants' title is evidenced by a patent issued by the United States for lots 11, 14 and 15 (Record, page 96), and by Homestead entry certificate (Record, page 5). These records amount to a decision of the Secretary of the Interior that lots 11, 14 and 15 are swamp and overflowed land, that lots 12 and 13 are agricultural land. These facts and defendants' title cannot be assailed in a collateral proceeding, and oral testimony impeaching these records is inadmissable.

Knight vs. U. S L., Association, 146 U. S., 116.
Defendants' Brief, 36-38.

As to the title to lake beds in Iowa see defendants' brief commencing last paragraph on page 38, bottom of page 41, and cases therein cited.

For discussion of point that there is no Federal question see defendants' motion to dismiss writ of error and cases therein cited.

The courts have no power to make surveys or correct mistakes, but may determine as was done by the Supreme Court of Iowa, that a mistake was made.

Grant vs. Hemphill, 92 Iowa, 218.

When the Secretary of the Interior rendered his decision on March 18, 1898 (Record, page 74), deciding that an investigation be made to determine whether a mistake had been made, he had before him the decision of the Supreme Court of Iowa in the case of *Grant vs. Hemphill*, holding there had been a mistake, he had the evidence that the surveyors who made the original survey were drunk and unfit for duty while making the survey. He had before him the evidence of County Surveyor Painter that the meander lines as run could not have been run by actual measurements on the ground, but were run on paper only, he had had the evidence of Painter that instead of there being a lake on

sections 19-20-29 and 30, the land was from 16 to 41 feet above the high water level of the slough known as Mud Lake, situated in Clay County in section 25, township 97, range 35.

With this array of facts before him ought the Secretary to have ordered the investigation when the truth of each assertion was established by his investigation? Ought he to have approved, as he did, the Barber survey?

E. B. EVANS,
Counsel for Defendants in Error.

Supreme Court of the United States.

No. 175.—October Term, 1904.

George Schlosser, Plaintiff in Error,
vs.
W. L. Hemphill, Richard Ryan, and Palo Alto County, Iowa.

In error to the Supreme Court of the State of Iowa.

[May 8, 1905.]

The case is thus stated by the Supreme Court of Iowa, to which it had been carried by appeal from the District Court of Palo Alto County:

"This is an action in equity to quiet title to a tract of some two hundred and ninety acres of land in the south half of section 30, township 97, range 34 in Palo Alto County. Plaintiff is the admitted owner of lots 2 and 3, forming a part of said tract, and containing about ninety-nine acres. According to the original Government survey, made in 1857, this land was adjacent to a lake, which was meandered, and the meander lines were run along the north side of the said two lots. The remainder of the land claimed lies between this meander line and the alleged shore of the lake, and is the subject of the controversy. The half section in question, that is, such part of it as lies beyond the original meander line, was resurveyed by the Government in the year 1898, and platted into five lots, of which lots 11, 14, and 16 are claimed by defendant Hemphill, and lots 12 and 13 by defendant Ryan. These claims are founded upon conveyances from Palo Alto County, under a patent issued to the State, under the swamp land grant of 1850, and which is based upon the resurvey of 1898. Schlosser insists that the meander line is not his boundary, it not marking the edge of the lake, but that he is entitled to claim up to the east and west half section line of said section. There was a decree for plaintiff, and defendants appeal." 118 Iowa, 452.

The Supreme Court ruled that "where a body of water is meandered, such lines are not boundary lines, and the adjacent owner will usually take title to the actual shore, but where there is no adjacent body of water proper to be meandered, such line becomes a boundary, and the purchaser from the Government cannot claim title beyond it;" and held upon the facts that there was no body of water in section thirty necessary to be meandered, and that plaintiff could not claim title beyond the meandered line. The court said in concluding: "In our opinion the plaintiff has no right to any other than the land patented to his grantor, and the decree of the trial court must therefore be reversed." And entered judgment as follows:

"In this cause, the court being fully advised in the premises, file their written opinion reversing the judgment of the District Court.

"It is therefore considered by the court that the judgment of the court below be and it is hereby reversed and set aside, and the cause is remanded

for further proceedings in harmony with the opinion of this court, and that a writ of *procedendo* issue accordingly.

"It is further considered by the court that the appellee pay the costs of this appeal, taxed at $227.70, and that execution issue therefor."

This writ of error was thereupon brought.

Mr. Chief Justice FULLER delivered the opinion of the Court:

By its judgment the Supreme Court of Iowa reversed the decree of the trial court and remanded the cause "for further proceedings in harmony with the opinion of this court."

We have heretofore held that a judgment couched in such terms is not final in such a sense as to sustain a writ of error from this court. *Haseltine* v. *Bank*, 183 U. S. 130. It was there ruled that the face of the judgment is the test of its finality, and that this court cannot be called on to inquire whether, when a cause is sent back, the defeated party might or might not make a better case.

It is true that in Iowa the Supreme Court hears equity cases on appeal *de novo*, and the successful party is entitled to a decree in that court, if he moves for it, *First National Bank* v. *Baker*, 60 Iowa, 132; but in the present case no such decree was applied for or rendered. Nor did the Supreme Court direct the court below to dismiss plaintiff's petition, or in terms direct the specific decree to be entered.

And it has been repeatedly held by that court that when a case triable *de novo* is remanded for judgment in the court below, the parties may be permitted to introduce material evidence discovered since the original trial, and may amend the pleadings for the purpose of setting up matters materially affecting the merits, subsequently occurring. *Sanxey* v. *Iowa City Glass Company*, 68 Iowa, 542; *Adams County* v. *Railroad Company*, 44 Iowa, 335; *Shorthill* v. *Ferguson*, 47 Iowa, 284; *Jones* v. *Clark*, 31 Iowa, 497. In the latter case, the court below, the District Court, refused to permit amendments, holding, "as a matter of law, that when a chancery case has been appealed to the Supreme Court, and has been there heard upon its merits, and is remanded to the District Court, with instructions as set forth in the *procedendo* in this cause, the District Court has no power to grant leave to amend." But the Supreme Court reversed the District Court, and held that that court might, "at any time, in furtherance of justice, and on such terms as may be proper, permit a party to amend any pleadings or proceedings. Rev. § 2977."

Doubtless the conclusions arrived at by the State Supreme Court, and expressed in its opinion, furnish the grounds on which the court below must proceed, when the case goes to a decree there, if no change in pleadings or proof takes place, but we cannot say what action might nevertheless be taken, and as no decree was entered in the Supreme Court, and

no specific instruction was given to the court below, we think the writ of error cannot be maintained. Assuming, without deciding, that a Federal question was so raised as otherwise to have justified the exercise of our jurisdiction, we can but repeat what we said in Haseltine's case: "The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher*, they might have sued out a writ of error at once."

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.